Supreme Court, U.S.
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No. OFFICE OF THE CLERK

IN THE

SUPREME COURT of the UNITED STATES

Douglas R. Knutson and Linda F. Knutson,

Petitioners,

v.

City of Fargo, a municipal corporation,

Respondent.

On Petition For Writ of Certiorari
To The United States Court of Appeals
for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

A deteriorated municipal cast iron water main broke causing extensive damage to adjacent private property. The private landowners, believing North Dakota's constitution and laws would provide relief, brought an action in state court relying upon state law alone.

Landowners and Petitioners Douglas R. Knutson and Linda F. Knutson exhausted their state remedies without obtaining any relief, or compensation, for the damages to their home due to a surge of pressurized water from the City of Fargo's deteriorated water main. When pursuing their state remedies of inverse condemnation and trespass, neither the landowners, nor the City of Fargo, presented any federal issue for state court review. When reaching their decisions, the state courts did not rely upon, nor determine, any federal principal of law when denying landowners any relief.

These Petitioners concede landowners seeking just compensation for a taking, by a state actor, are required to exhaust their state remedies before they can claim a violation of the Just Compensation Clause of the Fifth Amendment to the Constitution of the United States of America in a federal district court. Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985). Eighth Circuit law also requires litigants to exhaust their state remedies before they can assert a valid claim, under 42 U.S.C. § 1983, for the denial

of procedural due process. Wax 'N Works v. City of St. Paul, 213 F.3d 1016 (8th Cir. 2000).

After exhausting their state remedies, these private landowners initiated a civil rights action in federal district court, under 42 U.S.C. § 1983, against the City of Fargo for the denial of just compensation, the denial of procedural due process, and for the deprivation of substantive rights guaranteed by Fourth and Fourteenth Amendments to the Constitution of the United States – federal claims that became viable only after the date the private landowners initiated the state court action against the City of Fargo.

The Eighth Circuit Court of Appeals correctly determined that the federal district court had jurisdiction over the Knutsons' civil rights complaint, but incorrectly determined that the Knutsons' federal action was barred by North Dakota's version of issue and claim preclusion.

The questions presented are:

Does a private landowner lose his right to pursue his federal right to Just Compensation by merely bringing a state action based on state law?

Do federal courts have the right to deny a federal remedy, provided by 42 U.S.C. § 1983, to private landowners asserting violation of reserved federal rights never litigated in a prior state action?

Did the Court of Appeals properly determine that Petitioners' 42 U.S.C. § 1983 action against the City of Fargo, for its denial of their federal right to just compensation, was barred by North Dakota's version of issue preclusion?

Did the Court of Appeals properly determine that Petitioners' 42 U.S.C. § 1983 action, against the City of Fargo, was barred by North Dakota's version of claim preclusion even though not one portion of Petitioners' federal civil rights action was ripe or viable at the time Petitioners initiated a prior state action involving only state claims of inverse condemnation and trespass?

Did the Petitioners, who were required to first pursue their state claims in state court to ripen their federal claims, effectively preserve their federal constitutional issues for federal court review by not litigating their federal claims in state court?

LIST OF ALL PARTIES TO THE PROCEEDING

The Petitioners, Douglas R. Knutson and Linda F. Knutson, are husband and wife, and live at 1024 1st Avenue North , Fargo, North Dakota.

The Respondent, City of Fargo, is a municipal corporation organized under the laws of the State of North Dakota.

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PETITION FOR WRIT OF CERTIORARI

To the Honorable John G. Roberts, Jr., the Chief Justice and Associate Justices of the Supreme Court of the United States of America.

Petitioners, Douglas R. Knutson and Linda F. Knutson, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

Federal opinions:

The opinion of the Eighth Circuit Court of Appeals is reported in Knutson v. City of Fargo, 600 F.3d 992 (C.A.8 2010). The decision is found at Appendix pages 1 through 15.

The unreported Order of May 19, 2010, of the Eighth Circuit Court of Appeals which denied the Knutsons' petition for rehearing is found at Appendix page 56.

The United States District Court for the District of North Dakota's Order Dismissing Case of March 28, 2008, is Knutson v. City of Fargo, Not Reported in F.Supp. 2d, found at 2008 WL 879735. The Order Dismissing Case is found at Appendix pages 16 through 31.

State opinions:

The opinion of the Supreme Court of North Dakota is reported in Knutson v. City of Fargo, 2006 ND 97, 714 N.W.2d 44, and is found at Appendix pages 32 through 47.

The unreported Memorandum Opinion and Order of the District Court of Cass County, North Dakota, dated September 14, 2005, is found at Appendix pages 48 through 55.

BASIS FOR JURISDICTION

The Court has jurisdiction under 28 U.S.C. § 1254(1). Pursuant to Supreme Court Rule 13.1, this petition is filed within 90 days of the denial of the petition for rehearing by the Court of Appeals on May 19, 2010. Appendix page 56.

CONSTITUTIONAL PROVISIONS AND STATUTES AND RULES INVOLVED IN THIS PETITION

Article IV of the Articles of Amendment to the Constitution of United States of America states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or

> affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Article V of the Articles of Amendment to the Constitution of the United States of America states:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Article XIV, § 1, of the Articles of Amendment to the Constitution of the United States of America states:

> § 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of

> the United States, nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983 provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or * * *, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, * * *

28 U.S.C. § 1738 provides in pertinent part:

> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

STATEMENT OF THE CASE

Background. Prior to July 8, 2003, the City of Fargo determined its cast iron water mains were deteriorating, and adopted a replacement policy that required a water main to have twelve (12) breaks per block before its replacement was recommended. On July 8, 2003, one of the City of Fargo's deteriorated cast iron water mains broke causing a surge of pressurized water to damage the Knutsons' home and yard.

In August, 2004, the Knutsons sued the City of Fargo, in state district court, alleging a state law claim of inverse condemnation under Article I, § 16 of the Constitution of North Dakota, and a state claim based upon trespass principles. The City of Fargo answered, and asserted for the first time, that it was entitled to discretionary function immunity as one of its defenses. The state district judge summarily dismissed the state inverse condemnation action because of his determination that the "City of Fargo must have performed some affirmative act similar to exercising the power of eminent domain" to be actionable. Appendix, page 52. The Knutsons appealed from the state district court's judgment to the Supreme Court of North Dakota. The Supreme Court of North Dakota dismissed the Knutsons' state inverse condemnation action determining that the City of Fargo's adopted cast iron water main policy was not a "deliberate act" that supports a North Dakota inverse condemnation claim, even though, it also determined that the requisite "deliberate act"

can be done "intentionally, negligently, or innocently." Knutson v. City of Fargo, 2006 ND 97, ¶¶ 12-14, 714 N.W.2d 44. Appendix, pages 39-41. The Supreme Court of North Dakota also distinguished prior North Dakota inverse condemnation cases by determining, "This is a case of one flooding caused by the rupture of one water main, not damage over time." Id., ¶ 14. Appendix, page 41.

Both the state district court's judgment and the Supreme Court of North Dakota's judgment are based upon matters of state law alone. Neither the Knutsons, nor the City of Fargo, presented an issue of federal law to either the state district court or the Supreme Court of North Dakota for resolution. In other words, in the antecedent state court litigation, the Knutsons took "no action to broaden the scope of the state court's review beyond deciding the antecedent state-law issue." England v. Louisiana Bd. of Medical Examiners, 375 U.S. 411, 421-422, (1964).

Erroneously believing it had no jurisdiction under Rooker-Feldman,[1] the Federal District Court dismissed the Knutsons' federal civil rights action [based upon 42 U.S.C. § 1983]. The Eighth Circuit Court of Appeals properly determined the Rooker-Feldman doctrine inapplicable, but erroneously concluded that North Dakota's version of issue preclusion [and claim preclusion] bars the Knutsons'

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[1] Rooker v. Fid. Trust Co., 263 U.S. 413 (1923); D.C. Court of Appeals v. Feldman, 460 U.S. 462 (1983).

federal Fifth/Fourteenth Amendment action for the Denial of Just Compensation. The Eighth Circuit Court of Appeals erroneously concluded that North Dakota's version of claim preclusion barred Knutson's federal civil rights actions based upon the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution. The Eighth Circuit Court of Appeals determined that the Knutsons' England type of reservation of federal rights as "ineffective under San Remo Hotel".

Issue preclusion. This case challenges the idea, articulated below, that two homeowners' federal civil rights action for the deprivation of Just Compensation, is barred by issue preclusion when state law affords the homeowners less protection than what is required by Fifth/Fourteenth Amendment principles of federal law. North Dakota courts apply issue preclusion only when the issues in prior and current proceedings are substantially identical. Gepner v. Fujicolor Processing, Inc., 2001 ND 207, 637 N.W.2d 681. The Knutsons submit that if federal law requires just compensation to be paid to them, while state law does not, the issues are not identical and the Knutsons have a viable federal civil rights action, under 42 U.S.C. § 1983, for the denial of Just Compensation under the color of state law.

North Dakota law, as determined by the Supreme Court of North Dakota in Knutson v. City of Fargo, 2006 ND 97, 714 N.W.2d 44, does not provide the same protection to the landowners as the federal constitution and therefore the state issue is not

substantially identical to the federal issue. The Supreme Court of North Dakota's determination that the City of Fargo did not engage in a "deliberate act" that supports a state inverse condemnation claim conflicts with Fifth Amendment principles expressed in federal case law. To prove a Fifth Amendment taking, federal case law requires litigants to show that the "government's action set in motion the forces that cause the damage." Kingsport Horizontal Property Regime v. United States, 46 Fed.CL. 691, 695 (2000). The Supreme Court of North Dakota dismissed Knutsons' inverse condemnation case because, "This is a case of one flooding caused by the rupture of one water main, not damage over time." Knutson v. City of Fargo, supra., ¶ 14. Appendix, page 41. The one flood of Knutsons' home and land, should have resulted in an award of Just Compensation because, if "real estate is actually invaded by superinduced additions of water, ... so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the Constitution..." Pumpelly v. Green Bay, 80 U.S. 166, 181 (1871). See also, Coates v. United States, 117 Ct.Cl. 795, 93 F.Supp. 637 (1950).

Citing San Remo Hotel L.P. v. City of San Francisco, 545 U.S. 323 (2005), the Court of Appeals, below, writes "But 'the question is whether the state court *actually decided* an issue of fact or law that was necessary to its judgment.' *Id.*, at 342 (emphasis added)." Appendix, page 10. The Court of Appeals did not opine that the state courts determined a factual issue that would deny the Knutsons just

compensation if federal law were applied to their case. The Court of Appeals did not determine the Knutsons were erroneous in their analysis that federal law would require payment of just compensation to the Knutsons under the factual scenario presented to the state courts. Rather, the Court of Appeals applied issue preclusion solely because of its determination that the federal issue to be determined - denial of Just Compensation under color of state law - was necessarily litigated and decided by state courts when it addressed the Knutsons' inverse condemnation claims based upon state law. Appendix, pages 10-11. By so holding, the Court of Appeals forecloses the right of any landowner to seek a remedy from a federal district court, under 42 U.S.C. § 1983, even when the landowner can show just compensation is denied under state law principles that do not afford the same protection as federal law. So holding, the Court of Appeals forecloses the right of any landowner to reserve a federal issue for federal district court review as is more fully discussed below.

The Knutsons respectfully submit that the federal issues they sought to reserve, for federal district court determination, were not essential to the prior state judgment that was based upon state law alone. The main controversy in the state action was the Knutsons' remedies under state law. The federal issues, that arise in the Knutsons' federal civil rights action, are collateral to the former state controversy; the resolution of the federal issues was not essential to the former state court judgment that was based

upon state law alone. North Dakota courts do not apply claim preclusion to incidental or collateral issues. Issue preclusion is only applied to matters that are necessary and essential to support the former judgment. Riverwood Commercial Park, L.LC. v. Standard Oil Co. Inc., 2007 ND. 36, 729 N.W.2d 101. In the state proceedings, only issues of state law were necessary, or essential, to support the former state judgment.

Claim preclusion. Before the Knutsons could claim a violation of the Just Compensation Clause of the Fifth Amendment to the Constitution of the United States of America in a federal district court, they were required to exhaust their state remedies. Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985). Eighth Circuit law also requires litigants to exhaust their state remedies before they can assert a valid federal claim, under 42 U.S.C. § 1983, for the denial of procedural due process. Wax 'N Works v. City of St. Paul, 213 F.3d 1016 (C.A.8. 2000).

The Knutsons submit that since they did not have a viable federal claim under 42 U.S.C.§ 1983 at the time they initiated their prior state action, their federal action for the deprivation of their federal constitutional rights would not be barred by North Dakota's version of claim preclusion. North Dakota's version of claim preclusion does not require litigants to anticipate a cause of action, or claim, which does not exist at the time litigants initiate their action or claim. Borsheim v. O.J. Properties, 481 N.W.2d 590

(N.D. 1992). Simply put, the Knutsons did not suffer a constitutional injury for the deprivation of the Just Compensation Clause until they had unsuccessfully exhausted their state remedies. Their federal claim, under Fifth/Fourteenth Amendment principles, ripened only after they exhausted their state remedies.

State action also was not complete, and the Knutsons suffered no constitutional injury for the denial of procedural due process until the State of North Dakota failed to provide them with an adequate post judgment remedy for their property loss. Hudson v. Palmer, 468 U.S. 517, 532, n.12. (1984). The Knutsons did not suffer a federal constitutional injury for the denial of procedural due process or the denial of Just Compensation until the state remedies had been denied by the Supreme Court of North Dakota. Williamson, supra., page 195.

Knutsons' federal claims for the denial of Fourth Amendment rights, denial of substantive due process, and denial of equal protection, guaranteed to them by the Fourteenth Amendment, were not viable federal claims at the time the Knutsons filed their state action. The constitutional injury, for their substantive due process, equal protection, and one [or part] of their Fourth Amendment claims, is first triggered when the City of Fargo asserts discretionary function immunity within its state answer to Knutsons' state complaint. When the City of Fargo first asserted discretionary function

immunity, the City of Fargo deliberately shifted the risk of loss to the Knutsons for the danger it created, violating substantive due process rights of the Knutsons and Fourth Amendment principles. When asserting discretionary function immunity, the City of Fargo required the Knutsons to shoulder an unequal, and unfair, cost of government because of policy decisions the City of Fargo had made.

The Court of Appeals, below, also blurred the distinction between a mere trespass by a state actor, and a constitutional Fourth Amendment deprivation that can be remedied by a 42 U.S.C. § 1983 action. The Court of Appeals suggests Knutsons' federal claims "'are based upon the same underlying factual circumstances'–the break of a water main owned and maintained by the City and the City's failure to pay for the resulting damages." Appendix, page 12. The facts described by the Court of Appeals would support a state tort action against the City of Fargo. However to prove their federal action under 42 U.S.C. § 1983 another element must exist – the Knutsons must prove a constitutional injury. To do this, the Knutsons must prove that the City of Fargo's failure to pay for the property it damaged was due to a reason that was sanctioned by the color of state law. The Knutsons must prove that the City of Fargo's reason for nonpayment conflicts with federally guaranteed rights of the Knutsons. The City of Fargo's reason for nonpayment stems from its claim of discretionary function immunity which is conduct occurring subsequent to the Knutsons' state complaint.

The Fourth Amendment protects against unreasonable governmental interference in real and personal property. Presley v. City of Charlottesville, 464 F.3d 480 (C.A.4 2006); U.S. v. VaLerie, 424 F.3d 694 (C.A.8 2005). Another part of Knutsons' federal Fourth/Fourteenth Amendment claim stems from the Supreme Court of North Dakota's determination the City of Fargo cannot be a trespasser despite its maintenance policy [or lack of maintenance policy] having led to a deteriorated water that broke, causing a surge of pressurized water to directly damage the Knutsons' home and lot. If the City of Fargo had been determined to be a trespasser, there would be no state authority for the entry of waters upon the Knutsons' lands. A mere trespasser does not enjoy the color of state law to enter another person's lands. When the Supreme Court of North Dakota determined that the City of Fargo could not be a trespasser, the City of Fargo was given a badge of state authority [or color of state law] to enter and damage a home outside of the easement area [and outside of Fifth Amendment principles] without liability. By this extraordinary ruling, the City of Fargo's governmental powers dominates the Knutsons' right to own and possess property free from unreasonable seizure. The Rooker-Feldman doctrine should not prevent the federal district court from exercising jurisdiction over this component of the Knutsons' Fourth/Fourteenth Amendment claims, as suggested below. In their federal action, the Knutsons "'present[s] some independent claim, albeit one that denies a legal conclusion that a state court has reached in a case ..'" to which they were parties.

Exxon Mobil Corp. v Saudi Basic Industries Corp., 541 U.S. 280, 291-292 (2005). The Knutsons did not ask the federal courts, below, to overturn the state court judgment. They merely asked the federal courts to deny legal conclusions about state law, made by the state courts, that conflicts with federal constitutional law for federal issues that are first presented – to any court – by their federal action. The Knutsons respectfully submit that federal district courts, under 42 U.S.C. § 1983, have the jurisdictional duty to protect the American citizenry from unconstitutional action made under color of state law "'whether that action be executive, legislative, or judicial.'" Mitchum v. Foster, 407 U.S. 225, 242 (1972) [quoting Ex parte Virginia, 100 U.S. 339, 346 (1879)].

The Knutsons respectfully submit that the federal constitutional injuries that they must prove do not rest upon the same state of facts as that which existed at the time they initiated their state complaint. Claims barred by res judicata principles because they "*could have been raised*" applies only to claims that were either ripe or viable at the time the Knutsons commenced their former state lawsuit. Baker Group, L.C. v. Burlington N. & Santa Fe Ry. Co., 228 F.3d 883, 886 (C.A.8. 2000); Manning v. City of Auburn, 953 F.2d 1355, 1360 (C.A.11 1992). The City of Fargo's claim of discretionary immunity, within its state answer, was new conduct. The constitutional injuries suffered by the Knutsons because of this new conduct should not be barred by claim preclusion. The scope of the state litigation

was framed by the Knutsons' state complaint at the time it was filed. Los Angeles Branch NAACP v. Los Angeles Unified School District, 750 F.2d 731, 739 (C.A.9 1984). Although the Knutsons may have amended their state complaint, under N.D.R.Civ.P. 15(d), to include federal claims that arose after their complaint, they were not obligated to do so to avoid being punished by res judicata principles. Manning v. City of Auburn, supra., page 1360. Rule 15(d) of the North Dakota Rules Civil Procedure was adopted from the Federal Rules of Civil Procedure. North Dakota courts generally find that federal courts' interpretation, or application, of its rule as highly persuasive as to the North Dakota procedural rule. Dimond v. State ex rel. State Bd. of Higher Educ., 2001 ND 208, 637 N.W.2d 692.

England type reservation. This case further presents the issue of whether landowners, required to be in state court to ripen federal claims, can reserve federal issues and claims for federal district review by not litigating their federal issues or claims in state court, similarly to the reservation envisioned in England v. Louisiana State Board of Medical Examiners, 375 U.S. 411 (1964). In San Remo Hotel, L.P. v. City and County of San Francisco, Cal. supra., (2005), this Court concluded that litigants are "certainly entitled to reserve some of their federal claims ..." as long as the litigants do not "seek state review of the same substantive issues they sought to reserve". San Remo, page 338 and 346.

The Knutsons' England type reservation

should have precluded claim preclusion on their federal claims that required ripening under Williamson or were not viable at the time the Knutsons started their state action. Los Altos El Granada Invesotros v. City of Capitola, 583 F3d 674, FN3, (C.A.9 2009); DLX, Inc. v. Kentucky, 381 F.3d 511 (C.A.6 2004). The Knutsons' England type reservation should have also precluded issue preclusion for their Fifth/Fourteenth Amendment claim in that the Knutsons never asked for "state review of the same substantive issues they sought to reserve" for the federal district court. San Remo, supra., page 346.

The Eighth Circuit Court of Appeals writes, in part, " ... the Knutsons' attempted reservation of the claim for adjudication in federal court was ineffective under San Remo Hotel." Appendix, page 11. This language suggests that the Eighth Circuit Court of Appeals correctly determined that the Knutsons made an England type reservation of federal issues and claims for federal review and decision. Even though the Knutsons did not make an express reservation[2] of federal claims and federal issues in the prior state action– no federal issue or federal claim had been litigated by either party in state

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[2] Eighth Circuit law suggests that Knutsons did not need to make an express England type reservation of their federal issues. See, First American Bank & Trust Company, v. Ellwein, 520 F.2d 1309, 1311-1312 (C.A.8 1975). The Knutsons submit that an express reservation in state courts is an idle ceremony because state courts do not need to honor the reservation when rendering their decisions.

court. Further, no federal issue, nor federal principle of law had been mentioned or determined by the state courts.

If a state court does not determine a federal issue that a litigant has reserved for federal review, neither res judicata, nor the Rooker-Feldman doctrine, should prevent a federal district court from determining the reserved federal issue.

The Knutsons submit, in this case, the state courts honored the Knutsons' reservation. There is nothing in the state court judgment(s) that reflect either the state trial court, or the North Dakota Supreme Court, based its decision on a federal issue or claim that the Knutsons attempted to reserve for later federal review. The state courts dismissed the Knutsons' state claims on state grounds alone. Because state grounds were used to dismiss Knutsons' state lawsuit, it cannot be said that the federal issues, attempted to be reserved by the Knutsons, were necessary to the state judgment, as the Court of Appeal erroneously concludes. Appendix, pages 10-11. Because of the Knutsons' reservation of federal issues and claims, the North Dakota courts' silence should be considered to be an acquiescence of Knutsons' reservation so as to allow the federal court to review federal issues and federal claims.

If the state courts' silence on federal issues is viewed as an acquiescence of an England type reservation, it will promote federal-state comity by preserving the role of state courts to define state law,

and the primacy of federal courts to decide federal issues. Los Altos El Granada Invesotros v. City of Capitola, supra., at page 885. If a state court's silence on a federal issue is viewed as an acquiescence of an England type reservation, litigants, forced into state courts to ripen their federal claims, will have a clear path as to whether the federal district court [under 42 U.S.C. § 1983] will have jurisdiction when just compensation is denied. If the state court dishonors the litigants' England type reservation and decides federal issues, the litigants will know that this Court [by writ of certiorari from the state's highest court] is the only path to federal review of the federal issues.

By not restricting res judicata principles to matters *actually litigated* in state courts, the Court of Appeals, below, negates any possibility for a litigant to reserve a federal issue for federal court review when those federal issue(s) require ripening, or are not viable, at the time of the commencement of the state action.

REASONS FOR GRANTING THE WRIT

The Court of Appeal, below, writes, "... the Knutsons' attempted reservation of the claim for adjudication in federal court was ineffective under San Remo Hotel." Appendix, page 11. The Knutsons respectfully submit that the Court of Appeal's decision conflicts with the clear language of San Remo Hotel, L.P. v. City and County of San Francisco, Cal. supra., (2005) establishing that

litigants are "certainly entitled to reserve some of their federal claims ..." as long as they do not "seek state review of the same substantive issues they sought to reserve". San Remo, page 338 and 346. The San Remo litigants attempted to re-litigate issues resolved by a state court and ran afoul of the full faith and credit requirements of 28 U.S.C. § 1738. The Knutsons did not attempt to litigate their federal issues in the state courts and the state courts, by their silence of federal issues, honored the Knutsons' reservation of federal issues and claims for federal district court review.

The Knutsons recognize that their reservation of federal rights, tantamount to an England reservation, will not enable them to avoid preclusion of federal issues *actually litigated* in the state forum. However, the Knutsons never litigated any of their federal issues or federal claims in the state court system and the state courts, as evidenced by their silence of federal issues, honored the Knutsons' England type reservation. The Knutsons submit that their reservation of federal rights should allow them to preserve, for federal review, all federal issues and federal claims that have *never been litigated* in a state court. The determination, made by the Eighth Circuit Court of Appeals, negates any right of the Knutsons to preserve a federal issue [that required ripening] for later federal review.

The effect of an England type of reservation is an important federal issue that should be uniformly applied by all federal courts. Similarly, limiting the

bar of res judicata [for matters that "*could have been raised*"] to federal claims that were viable, at the time the prior state action was initiated, is an important federal issue. These issues touch upon the jurisdiction of the federal district court and its empowerment, under 42 U.S.C. § 1983, to deny legal conclusions made by state courts about state law when the state court's legal conclusion denies federally guaranteed rights. The uniform application of these issues helps assure the "the primacy of the federal judiciary in deciding questions of federal law." England, supra., at 415-416. The uniform application of these rules preserves the jurisdiction of the federal district courts to safeguard federally guaranteed rights that is granted in 42 U.S.C. § 1983.

Under the Eighth Circuit Court's of Appeals decision, the Knutsons lose any right to choose a federal court to determine the federal issue that required ripening under Williamson. Determining that federal issues relating to the denial of just compensation are essential to the former state judgment – even when not raised or ripe – completely locks the door of the federal district court to a litigant deprived of just compensation who must first pursue his state remedies to ripen his federal claims. The better approach to issue preclusion, relating to litigants forced into state courts to ripen their federal issue, is to look at what was actually said by the state courts concerning the state issues that are being determined. If the state court's declaration of state law conflicts with federal principles, then the decided state law and the federal issue are not identical

issues, and issue preclusion is inapplicable.

The Knutsons advance an approach to issue preclusion for litigants that are in state court to ripen their federal claims, that honors 28 U.S.C. § 1738, and still protects federal district court jurisdiction. Implicit in this Court's San Remo observation, that litigants are free to reserve their federal claims for federal review, is that the federal Just Compensation issue is not necessary and essential to a state inverse condemnation action that is based on state law alone. Under the approach to issue preclusion advanced by the Knutsons, both the federal district court and the state court can honor an England type reservation – as the North Dakota courts have done by not deciding any federal issue.

The Eighth Circuit Court of Appeal's decision also conflicts with the accepted view of other Circuit Courts that an England reservation effectively prevents claim preclusion even if a litigant has an opportunity to raise all of his federal claims in the state court. See, Tovar v. Billmeyer, 609 F.2d 1291, 1294 (9th Cir. 1979); Los Altos El Granada Invesotros v. City of Capitola, supra., at 685-686; and DLX, Inc. v. Kentucky, supra., at 523-524.

If an England type reservation is deemed ineffective, only federal claims in existence at the time the Knutsons' initiated their state complaint should be barred by claim preclusion. Manning v. City of Auburn, supra., at 1359-1360. The Knutsons respectfully submit that they should not have fallen

into the Williamson trap because none of their federal claims were ripe or viable at the time they initiated their former state action, and the dismissal of their federal action is a miscarriage of justice. The Knutsons' federal claims are based on conduct of the City of Fargo occurring after the Knutsons initiated their former state action, or on federal claims that required ripening.

Under the Eighth Circuit Court of Appeal's decision, litigants do not enjoy the choice of preserving federal issues for federal review. Under the decision below, litigants must always present federal issues to state courts for determination even if they are not ripe or involve conduct that occurs after the state action was initiated. The decision below effectively destroys a federal district court's authority, under 42 U.S.C. § 1983, to provide a remedy for the deprivation of federal law just because a state court might have determined a collateral state issue.

As expressed in Pumpelly v. Green Bay, supra., on pages 177 and 178:

> It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen,

> and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not *taken* for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for invasion of private rights under the pretext of the public good, which had no warrant in the law or practices of our ancestors.

The Knutsons' experience in the state court produced a "very curious and unsatisfactory result" that should have been remedied by the federal courts.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

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Member of this Court
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No. _____

IN THE

SUPREME COURT of the UNITED STATES

Douglas R. Knutson and Linda F. Knutson,

Petitioners,

v.

City of Fargo, a municipal corporation,

Respondent.

On Petition For Writ of Certiorari
To The United States Court of Appeals
for the Eighth Circuit

Appendix to Petition for Writ of Certiorari

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United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 08-1894

Douglas R. Knutson;
Linda F. Knutson,

Appellants,

v.

City of Fargo, a
municipal corporation,

Appellee.

Appeal from the
United States
District Court for the
District of North Dakota.

Submitted: November 14, 2008
Filed: April 12, 2010

Before MELLOY, BOWMAN, and SMITH, Circuit Judges.

BOWMAN, Circuit Judge.

Douglas and Linda Knutson appeal from the order of the District Court dismissing without prejudice their 42 U.S.C. § 1983 suit against the City of Fargo, North Dakota.

On July 8, 2003, a cast-iron water main belonging to the City broke, flooding the Knutsons' property and damaging their house and yard. In August 2004, they filed suit against the City in state court seeking damages under state-law legal theories of inverse condemnation, intentional trespass, and negligence. The state district court granted the City's motion for summary judgment, and the North Dakota Supreme Court affirmed. Knutson v. City of Fargo, 714 N.W.2d 44 (N.D.2006). The Knutsons did not file a petition for a writ of certiorari in the United States Supreme Court.

On July 23, 2007, the Knutsons filed their § 1983 complaint against the City in federal court, alleging violations of their rights under the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution. Without filing an answer, the City moved to dismiss under Rule 12(c) of the Federal Rules of Civil Procedure (motion for judgment on the pleadings after the pleadings are closed). Applying the Rooker-Feldman[FN1] doctrine, the District Court determined that it lacked subject-matter jurisdiction over the Fifth and Fourteenth Amendment claims. Alternatively, the court concluded that each of the constitutional claims was barred under issue or claim preclusion. The court dismissed the complaint without prejudice and

denied the City's motion as moot. The Knutsons appeal.

> FN1. Rooker v. Fid. Trust Co., 263 U.S. 413 (1923); D.C. Court of Appeals v. Feldman, 460 U.S. 462 (1983).

We review de novo the District Court's legal conclusions regarding its own subject-matter jurisdiction. See Ark. Blue Cross & Blue Shield v. Little Rock Cardiology Clinic, P.A., 551 F.3d 812, 816 (8th Cir.2009). Likewise, we review de novo the preclusive effects of a previous state-court judgment on this federal case. See St. Paul Fire & Marine Ins. Co. v. Compaq Computer Corp., 457 F.3d 766, 770 (8th Cir.2006) ("The application of res judicata, or claim preclusion, is reviewed de novo."); Boudreau v. Wal-Mart Stores, Inc., 249 F.3d 715, 719 (8th Cir.2001) ("A trial court's determination as to whether the legal prerequisites for issue preclusion have been met on the facts before it is a mixed question of law and fact, subject to de novo review by this court.").

For their first issue on appeal, the Knutsons argue that none of their federal constitutional claims is barred by the Rooker-Feldman doctrine. We agree.

Congress reserved review of state-court final decisions to the United States Supreme Court, and such appeals cannot be taken in the lower federal courts. 28 U.S.C. § 1257. As a consequence, "a party losing in state court is barred from seeking what in

substance would be appellate review of the state judgment in a United States district court, based on the losing party's claim that the state judgment itself violates the loser's federal rights," a rule known as the Rooker-Feldman abstention doctrine. Johnson v. De Grandy, 512 U.S. 997, 1005-06 (1994). In recent years, the Court has expressed some disapproval of the lower federal courts' extension of the doctrine to "overrid[e] Congress' conferral of federal-court jurisdiction concurrent with jurisdiction exercised by state courts, and supersed[e] the ordinary application of preclusion law." Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280, 283 (2005). Indeed, the Supreme Court has observed that Rooker and Feldman were the only two cases in which the Court applied the doctrine to conclude there was no federal jurisdiction. Id. at 287; Lance v. Dennis, 546 U.S. 459, 463 (2006) (per curiam). One Justice has gone so far as to declare the doctrine "interred" as a result of the unanimous opinion in Exxon Mobil. Lance, 546 U.S. at 468 (Stevens, J., dissenting). At the very least, we are reminded of the narrow application of the rule, "confined to ... cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." Exxon Mobil, 544 U.S. at 284. "Rooker-Feldman is not simply preclusion by another name." Lance, 546 U.S. at 466.

In this case, the Knutsons are not "complaining of an injury *caused by* the state-court

judgment and seeking review and rejection of that judgment." Exxon Mobil, 544 U.S. at 291 (emphasis added).[FN2] The injury they complained of, and sought compensation for, in the District Court-damage to their property-was the result of the alleged action (or inaction) of the City of Fargo, not a consequence of the state-court judgment wherein that court declined to grant the requested remedy (money damages) for the injury. Cf. Skit Int'l, Ltd. v. DAC Techs. of Ark., Inc., 487 F.3d 1154, 1157 (8th Cir.) ("[T]he alleged injury for which [plaintiff] seeks redress ... stems directly from the state court judgment itself rather than from some separate injury caused by the defendant."), cert. denied, 552 U.S. 991 (2007). We hold that the District Court erred in concluding that it lacked subject-matter jurisdiction under Rooker-Feldman to decide the Knutsons' Fifth and Fourteenth Amendment claims. [FN3]

> FN2. As we explore in detail in our discussion of the preclusion doctrines, infra at 9-10, the Knutsons do seem to make a run at claiming that their federal constitutional rights were violated by the North Dakota Supreme Court's judgment itself, maintaining in their Rooker-Feldman argument that it was not until that court's decision came down that they realized the City was acting under color of law, and so they did not have a cause of action under § 1983 until then. See Br. of Appellants at 41-42. If we were to countenance this rather absurd contention (after all, they sued the City as a governmental entity), the Knutsons'

claims *would* all be Rooker-Feldman barred.

FN3. The District Court did not consider the City's Rooker-Feldman argument as to the Knutsons' Fourth Amendment claim.

But that does not mean that the District Court should have reached the merits of the Knutsons' claims, for to do so would have violated the Full Faith and Credit Act. Under 28 U.S.C. § 1738, the federal courts are required "to give the same preclusive effect to state court judgments that those judgments would be given in the courts of the State from which the judgments emerged." Kremer v. Chem. Constr. Corp., 456 U.S. 461, 466 (1982). Full faith and credit comprises the law of issue and claim preclusion and "is not a jurisdictional matter." Exxon Mobil, 544 U.S. at 293. This brings us to the Knutsons' second issue on appeal, which challenges the District Court's application of preclusion principles to their case. The court held that their Fifth Amendment claim was barred by issue preclusion and their Fourth and Fourteenth Amendment claims were barred by claim preclusion. We agree that the Knutsons are foreclosed by the full-faith-and-credit statute from litigating their claims in federal court.

Under issue preclusion, previously known as collateral estoppel, "once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first

case." Allen v. McCurry, 449 U.S. 90, 94 (1980). Under claim preclusion, also called res judicata, "a final judgment on the merits of an action precludes the parties ... from relitigating issues that were or could have been raised in that action." Id. According to the terms of the full-faith-and-credit-statute, we apply state preclusion law in our analysis. See Marrese v. Am. Acad. of Orthopaedic Surgeons, 470 U.S. 373, 380 (1985). In North Dakota, the preclusion doctrines operate "to promote the finality of judgments," resulting in increased certainty for litigants and conservation of judicial resources. Ungar v. N.D. State Univ., 721 N.W.2d 16, 20 (N.D.2006).

Under North Dakota law, issue preclusion will apply in a case like this one if (1) the issue decided in the state-court adjudication is identical to the one presented in federal court, (2) the state-court judgment on the merits is final, (3) the party against which the doctrine is invoked in the federal action was a party in the state case, and (4) that party was given a fair opportunity in state court to be heard on the issue. See Baker Elec. Coop., Inc. v. Chaske, 28 F.3d 1466, 1475 (8th Cir.1994). The rule "forecloses relitigation of issues of either fact or law in a second action based on a different claim, which were necessarily litigated, or by logical and necessary implication must have been litigated, and decided in the prior action." Ungar, 721 N.W.2d at 21. The Knutsons contend that the issues are not identical and that they were not given a fair opportunity to be heard in the state court.

In their inverse-condemnation claim in state court, the Knutsons sought "just compensation" for the "taking or damage" of their property under Article 1, Section 16 of the North Dakota Constitution. State Compl. at 3. In federal court, the Knutsons sought "just compensation" for the "taking" of their property under the Fifth Amendment to the United States Constitution. Federal Compl. at 5. As relevant here, the North Dakota Constitution declares that "[p]rivate property shall not be taken or damaged for public use without just compensation." Under the Fifth Amendment, "nor shall private property be taken for public use, without just compensation." The language in the two constitutions is nearly identical, such that the North Dakota Supreme Court "has looked to both state and federal precedents in construing takings claims under the state constitution, and [its] cases on inverse condemnation under the state constitution bear some similarities to the federal analysis." Wild Rice River Estates, Inc. v. City of Fargo, 705 N.W.2d 850, 856 (N.D.2005) (citations omitted), cert. denied, 547 U.S. 1130 (2006). We conclude that the issue sought to be litigated in federal court-the City's alleged taking of private property without just compensation-was "necessarily litigated ... and decided" by the state courts in their consideration of the Knutsons' inverse-condemnation claim-where they sought compensation from the City for the taking of their property. Ungar, 721 N.W.2d at 21; see Knutson, 714 N.W.2d at 47-50. Indeed, the Knutsons' takings claim, although ultimately rejected by the state courts, may have benefitted from an analysis more

charitable to their position than that claim would have been entitled to in federal court: the "state constitutional provision is broader in some respects than its federal counterpart because the state provision 'was intended to secure to owners, not only the possession of property, but also those rights which render possession valuable.'" Wild Rice River Estates, 705 N.W.2d at 856 (multiple internal quotation marks and citations to quoted cases omitted).

The Knutsons argue that because they raised only issues of state law in state court, and because the state court only considered state law, they "reserved" their Fifth Amendment issue for federal court review. Br. of Appellants at 62-64. This is the rationale for their position that they were denied a fair opportunity to be heard. On a related note, the Knutsons contend that they could not have brought the federal constitutional claim in state court because their Fifth Amendment rights were not violated, and their federal takings claim therefore was not ripe for adjudication, until the North Dakota Supreme Court denied them just compensation for the damage to their property. [FN4] Id. at 65.

> FN4. This ripeness argument is advanced in greater detail in the Knutsons' brief under their Rooker-Feldman discussion. See Br. of Appellants at 39-41. Because it is actually a preclusion issue, we address it here.

Fifth Amendment takings claims brought in

federal court have a state exhaustion requirement. "[I]f a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation." Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 195 (1985). In San Remo Hotel, L.P. v. City & County of San Francisco, California, the Supreme Court was asked to decide whether it "should create an exception to the full faith and credit statute, and the ancient rule on which it is based, in order to provide a federal forum for litigants who seek to advance federal takings claims that are not ripe until the entry of a final state judgment denying just compensation." 545 U.S. 323, 337 (2005).

The Court noted that property owners who brought a state-court takings claim were "certainly entitled to reserve" federal claims under Supreme Court precedent. Id. at 338. But because of the interests in avoiding piecemeal litigation and giving full faith and credit to state-court judgments, the property owners ran the risk of being precluded from having those claims heard in federal court, as there is no "right" to have federal claims decided by a federal court. Id. at 342. In concluding that there is no exception to the full-faith-and-credit preclusion doctrines for takings claims, notwithstanding the state-court exhaustion requirement, the Court declared, "[W]e are not free to disregard the full faith and credit statute solely to preserve the availability of a federal forum." Id. at 347. As a result, "a

significant number of plaintiffs will necessarily litigate their federal takings claims in state court," id. at 346, but such is a consequence of Congress's express concern for "the weighty interests in finality and comity," id. at 345.

The Knutsons attempt to distinguish San Remo Hotel based on its facts, noting that the state court in that case applied federal law to the takings claim that the plaintiffs had tried to reserve, whereas the state courts in their case did not even mention federal law when deciding their takings claim. But "the question is whether the state court *actually decided* an issue of fact or law that was necessary to its judgment." Id. at 342 (emphasis added). The state-law takings claim adjudicated in the North Dakota state courts was "the same *substantive* issue[ ]" as the Fifth Amendment takings claim they now say they "sought to reserve." Id. at 346 (emphasis added). The North Dakota state courts were fully competent to adjudicate the Knutsons' Fifth Amendment claim, *see id.* at 347 and the Knutsons' attempted reservation of the claim for adjudication in federal court was ineffective under San Remo Hotel.

We hold that the doctrine of issue preclusion applies to the Knutsons' Fifth Amendment claim and that the claim was therefore properly dismissed.

As for the doctrine of claim preclusion, under which the District Court rejected the Knutsons' Fourth and Fourteenth Amendment claims, the North Dakota Supreme Court has declared this to be

the "more sweeping" of the two preclusion rules. Hofsommer v. Hofsommer Excavating, Inc., 488 N.W.2d 380, 383 (N.D.1992). Under state law, the Knutsons' federal-court claims are precluded if they "were raised or *could have been raised*" in the state-court proceeding, where the parties were the same and the judgment is final. Id. (emphasis added).

For their Fourth Amendment claim, the Knutsons asserted that "the surge of pressurized water" from the broken water main resulted in a seizure of their property and interfered with their right to be secure in their house and effects. Federal Compl. at 4. Their Fourteenth Amendment claim alleged denial of substantive and procedural due process and equal protection as a result of the City's refusal to pay the damages they incurred when the water main ruptured.[FN5] The Knutsons cite City of Fargo municipal policies regarding repair and replacement of water mains and discretionary immunity statutes, claiming that those "overly broad" and "unreasonable" policies and laws resulted in the alleged violations of their federal constitutional rights. Id. at 7.

> FN5. Of course, the Fourteenth Amendment is also invoked to make the Fourth and Fifth Amendments applicable to the City.

The Knutsons' federal claims could have been raised in the state-court action. They "are based on the same underlying factual circumstances"-the break of a water main owned and maintained by the

City and the City's failure to pay for the resulting damages. Lucas v. Porter, 755 N.W.2d 88, 97 (N.D.2008). It is of no consequence that their state-court suit raised state-law causes of action, while they are seeking in federal court to raise issues of United States constitutional law. Claim preclusion applies even though the federal "claims are based on different legal remedies or theories." Id. On these facts, the Knutsons' Fourth and Fourteenth Amendment claims are barred under claim-preclusion rules.[FN6]

> FN6. And if we are mistaken as to the issue-preclusive effect of the state-court judgment on the Knutsons' federal takings claims, that Fifth Amendment claim is unquestionably barred by claim preclusion.

In their challenge to the District Court's claim-preclusion decisions, the Knutsons contend that they did not know and could not have known that they had a federal civil-rights action until the state supreme court rendered its decision. See, e.g., Br. of Appellants at 52 ("The 'color of law' element was missing until the Supreme Court of North Dakota determined that the Knutsons did not have a viable trespass claim '[b]ecause the City had the authority to lay the water main in 1950.' "); id. at 57 ("[T]he Knutsons' [sic] assert that governmental immunity was unconstitutionally applied to their factual situation" by the state court.); id. at 59-60 ("When the Knutsons initiated their former state action, they could not reasonably anticipate that the state courts

would acquiesce in the City of Fargo's policies that deprive the Knutsons of their constitutional rights."). If the suggestion is that the Knutsons were unaware of the City's ownership and responsibilities vis-à-vis the City's water mains, this position defies common sense. Indeed, they sued the City of Fargo in the state-court suit. And if they really wish to insist that the North Dakota Supreme Court's decision in Knutson is "at odds with" the United States Constitution, id. at 49, then their recourse was to file a petition for certiorari in the United States Supreme Court challenging the state-court judgment on federal constitutional grounds, see D.C. Court of Appeals v. Feldman, 460 U.S. 462, 486 (1983). Were we to give credence to their claim that the state-court judgment itself violated federal constitutional law, their federal-court action would most certainly be Rooker-Feldman barred.

For their final issue on appeal, the Knutsons urge us to determine that the District Court erred when it relied on a statement their counsel made during oral argument before the North Dakota Supreme Court. In determining that the Knutsons' "Fourteenth Amendment claims were readily foreseeable and should have been raised in the underlying state court action," the District Court noted that "[c]ounsel for the Knutsons conceded during the [North Dakota] Supreme Court oral argument that he found not one case in which one act of 'nuisance' constituted inverse condemnation." Order at 6-7. We do not think that the District Court was using this comment as some sort of "evidentiary

admission ... as to matters of federal law" as the Knutsons maintain. Br. of Appellants at 68. In any event, we have reviewed the court's decision de novo and have not relied on the comment in question in holding that the Knutsons' Fourteenth Amendment claim is foreclosed by claim preclusion. But we see no reason why the District Court, like this Court, could not take judicial notice of the publicly available state-court argument, particularly where the issue at hand is possible preclusion of a federal claim as a result of those same state-court proceedings. Cf. Kent v. United of Omaha Life Ins. Co., 484 F.3d 988, 994 n. 2 (8th Cir.2007) ("[W]e may take judicial notice of other judicial opinions, and the earlier proceedings are relevant in deciding a claim of issue preclusion."); see also Pins v. State Farm Fire & Cas. Co., 476 F.3d 581, 585 (8th Cir.2007) (granting "motions to take judicial notice of unpublished state court proceedings and orders").

The judgment of the District Court is affirmed, except that the dismissal shall be modified to be with prejudice.

United States District Court,
D. North Dakota,
Southeastern Division.

Douglas R. KNUTSON and Linda F. Knutson, Plaintiffs,
v.
CITY OF FARGO, a municipal corporation, Defendant.

Civil No. 3:07 cv 68

March 28, 2008

David Alan Garaas, Garaas Law Firm, Fargo, ND, for Plaintiffs.

Mike J. Miller, Solberg Stewart Miller & Tjon Ltd, Fargo, ND, for Defendant.

ORDER DISMISSING CASE

RALPH R. ERICKSON, District Judge.

*1 Before the Court is a Motion by the City of Fargo ("the City") for Judgment on the Pleadings (Doc. # 6). Douglas Knutson and Linda Knutson ("the Knutsons") resist the Motion (Doc. # 7).

SUMMARY OF DECISION:

The Knutsons brought similar state claims on virtually identical facts in state court. The Knutsons' federal Constitutional challenges are therefore barred by the *Rooker-Feldman* doctrine, issue

preclusion and claim preclusion. This Court is without subject matter jurisdiction and the matter is therefore **DISMISSED** without prejudice.

FACTS:

On July 8, 2003, a City of Fargo cast iron water main broke. Water flowed onto the Knutsons' property, damaging their house and yard.

The Knutsons filed an action in state court on August 5, 2004. Their suit alleged the City had trespassed and had "taken or damaged for public use" their property, in violation of Article I, § 16, of the North Dakota Constitution (Doc. # 9-4, pp. 5-6).

The state district court granted summary judgment in favor of the City, concluding that arguably negligent acts by the City could not constitute trespass, an intentional tort, or inverse condemnation, which requires some affirmative act (Doc. # 9-4, pp. 51-53). Additionally, the district court concluded the City had discretionary immunity.

The Knutsons appealed to the North Dakota Supreme Court, which affirmed the district court. A petition for rehearing was denied.

Through this action, the Knutsons seek to use the United States Constitution to obtain federal remedies for the damage to their property.

DISCUSSION:

The Knutsons' § 1983 action arises under the Fourth, Fifth, and Fourteenth Amendments to the Constitution of the United States. They argue they have been deprived of their right to be secure in their house and effects as guaranteed by the Fourth and Fourteenth Amendments, that the flooding constitutes a Fourth Amendment seizure, that they were denied equal protection and due process of law as guaranteed by the Fourteenth Amendment, and that they were denied just compensation as guaranteed by the Fifth and Fourteenth Amendments.

Judgment on the pleadings under Rule 12(c), Fed.R.Civ.P., is appropriate where the moving party has established that there are no material issues of fact remaining and the moving party is entitled to judgment as a matter of law. *Potthoff v. Morin*, 245 F.3d 710, 715 (8th Cir.2001). An issue of fact is "material" if its resolution, one way or the other, could affect the outcome of the case. *Iowa Beef Processors, Inc. v. Amagamated Meat Cutters and Butcher Workmen of America, AFL-CIO*, 627 F.2d 853, 855 (8th Cir.1980). It does not appear that the parties dispute the facts or the procedural history of this case, and the case therefore appears to be ripe for adjudication. However, because the City has posited that preclusion doctrines render this Court without jurisdiction to hear the matter, this jurisdictional question must be resolved at the outset.

Preclusion Doctrines, Generally:

*2 Plaintiffs do not have a "right" to vindicate their federal claims in federal court. *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323, 342, 125 S.Ct. 2491, 162 L.Ed.2d 315 (2005). In fact, the Supreme Court has observed that "issues actually decided in valid state-court judgments may well deprive plaintiffs of the 'right' to have their federal claims re-litigated in federal court." *Id.* The Full Faith and Credit statute, 28 U.S.C. § 1738, provides that "Acts, records and judicial proceedings ... shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory, or Possession from which they are taken." The Full Faith and Credit statute gives rise to several doctrines that dictate when a court is without jurisdiction over a claim, issue, or even an entire case.

The *Rooker-Feldman* doctrine acts as a jurisdictional bar by depriving the federal courts of the power to reconsider matters previously resolved by state courts. *United States v. Timley*, 443 F.3d 615, 628 (8th Cir.2006) (citing *Lemonds v. St. Louis County*, 222 F.3d 488, 492 (8th Cir.2000)). *Rooker-Feldman* prohibits not only straightforward appeals but also review of matters "inextricably intertwined" with state court rulings. *Id.* A federal claim is "inextricably intertwined" with a state court's judgment if the federal claim may only succeed if the Court concludes the state court wrongly decided the issue. *Id.* (citing *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 25, 107 S.Ct. 1519, 95 L.Ed.2d 1 (1987)). The

doctrine has historically been applied liberally by the District and Circuit Courts; however, the Supreme Court recently emphasized the narrowness of the doctrine:

The *Rooker-Feldman* doctrine, we hold today, is confined to cases of the kind from which the doctrine acquired its name: cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments.

***Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, 544 U.S. 280, 284, 125 S.Ct. 1517, 161 L.Ed.2d 454 (2005).** In *Exxon Mobil Corp.*, the Supreme Court re-emphasized the availability and appropriateness of the more general preclusion doctrines, claim preclusion and issue preclusion.

"The doctrine of collateral estoppel, also known as issue preclusion, provides that 'when an issue of ultimate fact has been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in another lawsuit.' " *Chavez v. Weber*, 497 F.3d 796, 803 (8th Cir.2007) (quoting *United States v. Brekke*, 97 F.3d 1043, 1049 (8th Cir.1996)). North Dakota defines collateral estoppel as " 'generally foreclos [ing] the relitigation, in a second action based on a different claim, of particular issues of fact or law which were, or by logical and necessary implication must have been, litigated and determined in the prior suit.' " *Riemers*

v. Anderson, 680 N.W.2d 280, 285 (N.D.2004) (quoting *Reed v. University of North Dakota*, 589 N.W.2d 880, 883 (N.D.1999).

*3 Although claim and issue preclusion are related, the doctrines are not the same. *Ungar v. North Dakota State University*, 721 N.W.2d 16, 20 (N.D.2006). The North Dakota Supreme Court explains that res judicata, or claim preclusion, prevents relitigation of claims that were raised, or could have been raised, in prior actions between the same parties or their privies. Thus, res judicata means a valid, existing final judgment from a court of competent jurisdiction is conclusive with regard to claims raised, or those that could have been raised and determined, as to their parties and their privies and all other action. Res judicata applies even if subsequent claims are based upon a different legal theory.

Id. at 20-21 (citations and quotations omitted).

Fourth Amendment "Unreasonable Governmental Interference" Claim:

The Knutsons' Fourth Amendment claim is based on alleged unreasonable governmental interference with their property. The Knutsons argue this claim was not ripe until after their state proceedings gave rise to the finding that the City had the authority-and was therefore acting "under color of law"-when it laid the water main in 1950. The Knutsons assert they had no reason to suspect that the City was acting

under color of law until this determination arose in state court.

Res judicata, or claim preclusion, "prevents relitigation of claims that were raised, or could have been raised," between the same parties, whether based upon the same or different legal theories. *Ungar*, 721 N.W.2d at 20-21. The Knutsons argue that because the finding that the City was acting "under color of law" was not foreseeable, claim preclusion is not applicable. In *Borsheim v. O & J Properties*, the North Dakota Supreme Court held that "although the doctrine of res judicata may require a party to plead in the alternative with inconsistent claims ... it should not, if fairness and justice are not to be abandoned, require a party to anticipate a cause of action or claim which does not exist at the time of the commencement of the action or claim." 481 N.W.2d 590, 597 (N.D.1992). The Knutsons' reliance on *Borsheim* is misplaced. The evidence clearly establishes that the Knutsons knew or should have known that the City, a governmental entity, laid the water main as part of government function and was therefore acting "under color of law." Even though the Knutsons claim a lack of personal knowledge that the City laid the water main, this information was readily ascertainable by a review of public records. Thus, the Knutsons' assertion that they had no reason to know that the City had the authority to lay the water main in 1950 is either patently false or the result of deliberate ignorance. Neither position is sufficient as a matter of law.

The Court need not reach the Knutsons' argument that neither *Rooker-Feldman* nor issue preclusion are applicable to their Fourth Amendment claim, because the doctrine of claim preclusion is dispositive. The Fourth Amendment claim, if any, was reasonably foreseeable at the time the Knutsons brought their state court action. It arises out of the same facts and circumstances as the state claims, and it could have been brought in state court. State courts are fully competent to determine issues of federal constitutional law. *Middleton v. McDonald*, 388 F.3d 614, 618 (8th Cir.2004). Under these circumstances, the Fourth Amendment claims are clearly barred by the doctrine of claim preclusion.

Fourteenth Amendment Equal Protection and Due Process Claims:

*4 The Knutsons' Fourteenth Amendment claims are based on the North Dakota state court's and the City's alleged deprivation of the Knutsons' rights to substantive and procedural due process and equal protection under the law. The Knutsons contend these claims are not subject to the various preclusion doctrines because they could not reasonably anticipate the City's defenses of negligence, governmental immunity or North Dakota's failure to offer a remedy for a one-time flooding. The Knutsons assert that they could not reasonably anticipate the facts of the case or the state of the law and that the claims should not be barred by the preclusion doctrines for this lack of prescience.

Claim preclusion prevents relitigation of claims that could have been raised between the same parties, even if those claims are based on different legal theories. *Ungar*, 721 N.W.2d at 20-21. A review of the record reveals that these Fourteenth Amendment claims were readily foreseeable and should have been raised in the underlying state court action. The following ideas are pertinent and dispositive: 1) The state courts' decisions were based on well-established precedent; 2) Counsel for the Knutsons conceded during the Supreme Court oral argument that he found not one case in which one act of "nuisance" constituted inverse condemnation; 3) That the state court decisions were handed down as they were was not an unforeseeable result; and 4) These claims should have been pled in the alternative at the state court level and are therefore barred by claim preclusion.

Even if claim preclusion did not apply to the Knutson's Fourteenth Amendment claims, it appears to the court that these claims would be barred by the *Rooker-Feldman* doctrine. The *Rooker-Feldman* doctrine prohibits federal district courts from reviewing and rejecting state court judgments. *Exxon*, 544 U.S. at 284. Here, the Knutsons allege the denial of due process and equal protection arose directly out of the state court proceedings [FN1]. These federal claims could "only succeed if the Court concludes the state court wrongly decided the issue." *Timley*, 448 F.3d at 628. If the Knutsons believed the North Dakota Supreme Court's decision violated the

United States Constitution when the Court, singly or in concert with the City, denied the Knutsons due process of law or equal protection, the proper forum for such allegations was the United States Supreme Court. *Rooker-Feldman* prohibits review here.

> FN1. The Knutsons argue, "At the time [they] initiated their former state action, they could not reasonably anticipate that the North Dakota courts would acquiesce in the City of Fargo's adopted policies and actions that deliberately shift the risk and cost of government to the Knutsons." (Doc. # 7, p. 16). Douglas Knutson states, "Certain elements of this federal civil rights action, based upon Fourteenth Amendment violations, stem from the Supreme Court of North Dakota's decision in *Knutson v. City of Fargo* ..." and "[O]ur civil rights action did not accrue until after the Supreme Court of North Dakota acquiesced in the deprivation of our Fourteenth Amendment rights as evidenced by its decision." (Doc. # 9, ¶ ¶ 23 and 27).

Fifth Amendment Takings Claim

The Knutsons contend their property was taken without just compensation in violation of the Fifth and Fourteenth Amendments. The Fifth Amendment states, "Nor shall private property be taken for public

use, without just compensation."

The analysis here is different from the previous claims. Unlike claims under the Fourth and Fourteenth Amendments alleging unreasonable interference, deprivation of due process, and denial of equal protection, Fifth Amendment takings claims have an "exhaustion" component that is a prerequisite to bringing them to federal court. The United States Supreme Court held in *Williamson County Regional Planning Com'n v. Hamilton Bank of Johnson,* that a taking claim is not ripe until a party seeks compensation through the state. 473 U.S. 172, 194, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985). The Court stated, "The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation." *Id.* Until state court proceedings result in the denial of payment, then, there has been no taking without just compensation.

*5 Recognizing that prior state proceedings are necessary to a federal takings claim, one could naturally conclude that this claim is ripe and should proceed. However, such a superficial reading of considering *Williamson County* quickly leads to a procedural quagmire of preclusion doctrines. *I.e.*, the only way this Court could conclude a "taking" occurred is to find that the state improperly denied just compensation, attacking and nullifying the state court judgment-the very result *Rooker-Feldman* and the preclusion doctrines seek to prevent.

This predicament was entertained by the Eighth

Circuit Court of Appeals in *Kottschade v. City of Rochester*, 319 F.3d 1038 (8th Cir.2003). In *Kottschade*, the plaintiff pursued a takings claim in federal court without first pursuing relief in a state court inverse condemnation action. *Id.* at 1039. The District Court held that, under *Williamson County*, exhaustion of state court remedies was required before the claim could be heard in federal court. *Id.* at 1040. The Eighth Circuit affirmed, but observed:

> The plaintiff points out, and justly so, that if he is required to seek a postdeprivation remedy in a state-court inverse-condemnation action, he may end up being altogether denied a federal forum for what is undoubtedly a federal right.... If [the state courts] hold against him, for example, on the ground that no taking has occurred, doctrines of former adjudication may be a bar to a new action under § 1983 in a federal trial court.

Id. at 1041. As a solution, the Court hypothesized that a plaintiff may be able to reserve his federal claims. *Id.* at 1042. This has been the solution proposed by other circuits. *E.g. Santini v. Connecticut Hazardous Waste Management Service*, 342 F.3d 118, 121 (2d Cir.2003) (Holding that "litigants who pursue inverse condemnation actions in state court in order to comply with *Williamson County* may reserve their federal takings claims for later resolution in federal court."); *DLX, Inc. v. Kentucky*, 381 F.3d 511, 523 (6th Cir.2004) (Holding that a plaintiff's "reservation of federal takings claims in a state takings action will suffice to defeat claim preclusion in a subsequent federal action.").

The concern that *Williamson County* could act to prevent almost all litigation involving state takings from being brought in state court is not shared by the United States Supreme Court. The Supreme Court recently held that, despite the preclusive effect of *Williamson County*, federal takings claims are not exempt from the Full Faith and Credit statute. *San Remo Hotel v. City and County of San Franscisco, California*, 545 U.S. 323, 343-46, 125 S.Ct. 2491, 162 L.Ed.2d 315 (2005). In *San Remo Hotel*, the Court overruled *Santini* and its proposal of reserving federal takings claims, holding that "issues actually decided in valid state-court judgments may well deprive plaintiffs of the 'right' to have their federal claims relitigated in federal court." *Id.* at 342. This deprivation can occur even where the plaintiff clearly preferred not to litigate in state court, but was required to do so by statute or prudential rules. *Id.* The Supreme Court noted that the fact that an inverse condemnation claim is a prerequisite to a Fifth Amendment taking claim does not prevent a party from bringing a Fifth Amendment claim at the outset:

*6 The requirement that aggrieved property owners must seek compensation through the procedures the State has provided for doing so does not preclude state courts from hearing simultaneously a plaintiff's request for compensation under state law and the claim that, in the alternative, the denial of compensation would violate the Fifth Amendment of the Federal Constitution.

Id. at 346 (internal citations and quotations omitted).

In *San Remo Hotel*, the Supreme Court soundly rejected the notion that a plaintiff could somehow reserve his claims or that preclusion doctrines do not apply in takings proceedings, leaving the Knutsons with no claim that may be heard in federal court. Any of the preclusion doctrines could function to bar the Fifth Amendment takings claim. The doctrine of claim preclusion applies here because the Fifth Amendment claims could have been brought in state court. *San Remo Hotel*, 345 U.S. at 346. *Rooker-Feldman* prohibits this Court from hearing the Fifth Amendment claim because finding that the state courts were wrong to deny just compensation is a prerequisite to a plaintiff's "win" in federal court. Issue preclusion prohibits this Court from hearing the issues of fact related to the takings claim because the North Dakota and federal takings provisions are virtually identical,[FN2] and the state court's findings regarding governmental "action" [FN3] and discretionary immunity [FN4] are identical to, or even based on, federal law, issue preclusion appears to bar the takings claims as well.

> FN2. The federal Constitution states "Nor shall private property be taken for public use, without just compensation," and the North Dakota Constitution states, "Private property shall not be taken or damaged for public use without just compensation."

FN3. A federal "taking" may occur through the inevitably recurring invasion of water "due to authorized government *action*." *Barnes v. United States*, 210 Ct.Cl. 467, 538 F.2d 865, 871 (Ct.Cl.1976). *See also Accardi v. United States*, 220 Ct.Cl. 347, 599 F.2d 423, 429 (Ct.Cl.1979); *Pinkham v. Lewiston Orchards Irrigation District*, 862 F.2d 184, 189 (9th Cir.1988).

FN4. The North Dakota Supreme Court expressly adopted the discretionary immunity test applied by the United States Supreme Court in *Berkovitz v. United States*, 486 U.S. 531, 108 S.Ct. 1954, 100 L.Ed.2d 531 (1988). *Knutson*, 714 N.W.2d at 50.

CONCLUSION

Whether reserved or not, the Knutsons have no right to review of the same issues litigated before the state court. *San Remo Hotel*, 545 U.S. at 346. Every issue and claim raised in this federal action either was brought or could have been brought before the state courts. This Court is unable to hear this case without running afoul of the various preclusion doctrines. Therefore, the Court is without subject matter jurisdiction. The matter is hereby **DISMISSED** without prejudice. Because the Court lacks subject matter jurisdiction, the Motion for judgment on the pleadings cannot be heard on the merits and is found

to be **MOOT**.

Let judgment be entered accordingly.

IT IS SO ORDERED.
D.N.D.,2008.
Knutson v. City of Fargo
Not Reported in F.Supp.2d, 2008 WL 879735 (D.N.D.)

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

2006 ND 97

Douglas R. Knutson, and Linda F. Knutson, Plaintiffs and Appellants

v.

City of Fargo, North Dakota, a municipal corporation, Defendant and Appellee

No. 20050355

Appeal from the District Court of Cass County, East Central Judicial District, the Honorable Steven L. Marquart, Judge.

AFFIRMED.

Opinion of the Court by Sandstrom, Justice.

David A. Garaas, Garaas Law Firm, DeMores Office Park, 1314 23rd Street South, Fargo, N.D. 58103-3796, for plaintiffs and appellants.

Patricia A. Roscoe, Assistant City Attorney, 1129 5th Avenue South, P.O. Box 1897, Fargo, N.D. 58107-1897, for defendant and appellee.

Knutson v. City of Fargo

No. 20050355

Sandstrom, Justice.

[¶1] Douglas and Linda Knutson appeal the district court's summary judgment dismissing their inverse condemnation, intentional trespass, and negligence claims against the City of Fargo ("the City") for damages caused to their property after a city water main broke. We affirm.

I

[¶2] In July 2003, a water main located under the street adjacent to the Knutsons' home broke. Water flowed onto their property, damaging their house foundation, sidewalk, and fence. In August 2004, the Knutsons sued the City. They claimed the flooding of their property was an inverse condemnation because their property had been taken or damaged for public use protected by the eminent domain provision of the North Dakota Constitution. They also claimed the leakage was an intentional trespass and the City was negligent in maintaining the water main.

[¶3] Discovery in the case reflected the water main adjacent to the Knutsons' property was constructed in 1950. The main was made of unlined cast iron and was eight inches wide. According to the affidavit of Dennis Walaker, Director of Operations for Fargo Public Works, cast iron water mains deteriorate over time because soil corrosion will reduce the thickness of the water main's outside wall. The wall

deteriorates until a break occurs. Walaker contended no maintenance or repair procedure would have prevented the break that damaged the Knutsons' property.

[¶4] According to Walaker's affidavit and its attachments, the City had a water main replacement policy in place at the time the main broke. Under the policy, water mains in the worst condition are replaced first. Factors evaluated included breaks per city block, recent break history, age of the water main, and the type of main. If a city block experienced more than twelve breaks, replacement was recommended. If a block experienced between five and twelve breaks, the water main was replaced if the street was reconstructed, and recent break history was evaluated to decide whether replacement was needed. If a block experienced fewer than five breaks, recent break history and the type of street maintenance needed were considered. These blocks were given low replacement priority. According to Walaker, the policy has resulted in a significant reduction of water main breaks. When discovery was conducted, the City was replacing four to six miles of water main per year.

[¶5] Each party moved for summary judgment. The district court held that the Knutsons could not establish inverse condemnation because the City had taken no affirmative act to take or damage their property. The court also concluded the Knutsons could not establish trespass because the City had no intent for the main to break. It finally concluded the

City had discretionary immunity, which barred the Knutsons' negligence claim.

[¶6] On appeal, the Knutsons argue that the damage caused by the flooding was a taking or damaging for public use, that they can establish their trespass claim, and that the City is not immune from their negligence claim. The City argues the district court correctly granted summary judgment in its favor.

[¶7] The district court had jurisdiction under N.D. Const. art. VI, § 8, and N.D.C.C. § 27-05-06. The appeal was timely under N.D.R.App.P. 4(a). This Court has jurisdiction under N.D. Const. art. VI, §§ 2, 6, and N.D.C.C. § 27-02-04 and §§ 28-27-01 through 28-27-02.

II

[¶8] A grant of summary judgment is reviewed de novo, examining the evidence in a light most favorable to the opposing party. Makeeff v. City of Bismarck, 2005 ND 60, ¶ 12, 693 N.W.2d 639. All inferences must be viewed in favor of the non-moving party. Hurt v. Freeland, 1999 ND 12, ¶ 7, 589 N.W.2d 551.

III

[¶9] The Knutsons argue the district court erred when it granted summary judgment on their inverse condemnation action. The eminent domain provision of article I, section 16, of the North Dakota

Constitution requires that "[p]rivate property shall not be taken or damaged for public use without just compensation having been first made to . . . the owner . . . ." Inverse condemnation actions are a property owner's remedy, exercised when a public entity has taken or damaged the owner's property for a public use without the public entity's having brought an eminent domain proceeding. Eck v. City of Bismarck, 283 N.W.2d 193, 198 (N.D. 1979). To prove inverse condemnation, the property owner must prove that a public entity took or damaged his or her property for a public use and that public use was the proximate cause of the damage. Frank v. County of Mercer, 186 N.W.2d 439, 445-46 (N.D. 1971).

[¶10] The district court concluded that to maintain an inverse condemnation claim, "Fargo must have performed some affirmative act similar to exercising the power of eminent domain." The Knutsons argue an affirmative act similar to exercising eminent domain is not required, because a public entity can be liable not only if it acts purposely but also negligently. In Hamilton v. City of Bismarck, a claim for damages from the overflow of Bismarck's sanitary sewer through a manhole, this Court concluded that negligence could not support an inverse condemnation claim:

> [W]e distinguish between an action for damages based upon negligence and an action based upon damage to private property for public use within the

> purview of § 14 of the Constitution. That section of the Constitution does not bear upon damages resulting from negligence of public corporations or their agents; it deals with those damages that would normally flow from the exercise of the power of eminent domain.

71 N.D. 321, 327, 300 N.W. 631, 633-34 (1941). The district court relied on this language to conclude inverse condemnation required an affirmative act similar to eminent domain.

[¶11] The Knutsons rely on Jamestown Plumbing & Heating Co. v. City of Jamestown, 164 N.W.2d 355 (N.D. 1968), and Kinnischtzke v. City of Glen Ullin, 79 N.D. 495, 57 N.W.2d 588 (1953), as support that negligent acts by a public entity can support an inverse condemnation action. In Jamestown Plumbing & Heating, in which a street renovation resulted in excess pooling of water that caused a business's building to settle and water to be repeatedly pushed into and under the front door of the business, this Court said:

> We conclude that where a municipality purposely with due care or negligently so constructed the street improvement that it created a nuisance which resulted in damage to the property, the municipality is liable for the damage, regardless of the means employed or

> the intent or the lack of intent on the part of public officials.

164 N.W.2d at 361. The Jamestown Plumbing & Heating Court relied on Kinnischtzke. Id. In Kinnischtzke, in which the city negligently maintained a sewage system that discharged sewage into a creek, damaging the private owner's property and livestock, this Court said:

> Negligence may or may not result in the creation of a nuisance, and, on the other hand, a nuisance may be created wholly without negligence. . . .
>
> . . . .
>
> We reach the conclusion that where a municipality purposely or negligently so operates a sewage disposal plant that it becomes a nuisance which results in injury to property, the municipality is liable for damages in an amount sufficient to compensate for the injury.

79 N.D. at 510, 511, 57 N.W.2d at 596-97. On rehearing, this Court said:

> Negligence constitutes no exception to [the eminent domain provision of the North Dakota Constitution], nor is tort of any kind made an exception. If private property is taken or damaged for public use, compensation must be

> made in all cases, regardless of the means employed or the intent or the lack of intent on the part of public officials. There may be instances where private property is injured through the negligence of municipal officials acting in a governmental capacity which would not amount to damaging the property for public use within the meaning of Section 14 of our constitution. See Hamilton v. City of Bismarck, 71 N.D. 321, 300 N.W. 631. But that is not the case here. The facts set out in the complaint indicate that damage to property resulted from a governmental activity negligently conducted over a considerable period of time and in such a manner that it became a nuisance.

Id. at 515, 57 N.W.2d at 599.

[¶12] The Knutsons also rely on Pacific Bell v. City of San Diego, 96 Cal. Rptr. 2d 897 (Cal. Ct. App. 2000). Pacific Bell, however, supports the argument that some governmental act, whether done purposefully or negligently, is required to claim inverse condemnation. See id. at 909. The California Court of Appeals stated, "Damage caused by the public improvement as deliberately conceived, altered or maintained may be recovered under inverse condemnation and the presence or absence of fault by the public entity ordinarily is irrelevant." Id. at 903-

04 (citing Barham v. S. Cal. Edison Co., 88 Cal. Rptr. 2d 424, 431-32 (Cal. Ct. App. 1999); Marshall v. Dep't of Water & Power, 268 Cal. Rptr. 559, 567 (Cal. Ct. App. 1990)). While discussing McMahan's of Santa Monica v. City of Santa Monica, 194 Cal. Rptr. 582 (Cal. App. 1983), the Pacific Bell court stated:

> McMahan's recognized inverse condemnation is the remedy only for an injury to private property caused by a deliberate act for the purpose of fulfilling one of the public objects of the project as a whole. It also recognized that negligent acts committed during the routine day-to-day operation of the public improvement or negligence in the routine operation having no relation to the functioning of the project as conceived does not create a claim in inverse condemnation.

Pac. Bell, 96 Cal. Rptr. 2d at 909 (emphasis added).

[¶13] Reading these cases together, we conclude an inverse condemnation claim does not hinge on negligence or intent to harm. See Alan Romero, Takings by Floodwaters, 76 N.D. L. Rev. 785, 790-91 n.35 (2000) ("a physical seizure or occupation of property is a taking regardless of whether the government does so intentionally, negligently, or even innocently"). Under the North Dakota Constitution, inverse condemnation requires a public entity's taking or damaging an owner's property by

some deliberate act, whether done intentionally, negligently, or innocently. The district court found that the City had undertaken no deliberate act and that the Knutsons' claim was one of negligence.

[¶14] The Knutsons' reliance on Jamestown Plumbing & Heating and Kinnischtzke is not on point. Both Jamestown Plumbing & Heating and Kinnischtzke applied the eminent domain provision to a nuisance occurring repeatedly over a long period. See Jamestown Plumbing & Heating, 164 N.W.2d at 361 ("We conclude that where a municipality purposely with due care or negligently so constructed the street improvement that it created a nuisance which resulted in damage to the property, the municipality is liable for the damage, regardless of the means employed or the intent or the lack of intent on the part of public officials."); Kinnischtzke, 79 N.D. at 515, 57 N.W.2d at 599 (on rehearing) ("The facts set out in the complaint indicate that damage to property resulted from a governmental activity negligently conducted over a considerable period of time and in such a manner that it became a nuisance."). This is not a nuisance case like Jamestown Plumbing & Heating and Kinnischtzke. This is a case of one flooding caused by the rupture of one water main, not damage over time. A public entity may be held liable for nuisance under N.D.C.C. ch. 42-01. See Dempsey v. City of Souris, 279 N.W.2d 418, 420 (N.D. 1979) (private landowner sued city under N.D.C.C. § 42-01-01 for nuisance created by the city's operation of a sewage lagoon). Reliance on article I, section 16, of the North Dakota

Constitution is not necessary.

[¶15] In McMahan's, the California Court of Appeals concluded the city's knowledge of water main deterioration and failure to guard against breaks were deliberate acts. 194 Cal. Rptr. at 590. The Pacific Bell court agreed with McMahan's analysis and reversed the lower court in favor of the property owner on its inverse condemnation suit. 96 Cal. Rptr. 2d at 910, 913. In Pacific Bell, the court stated San Diego had no method of testing water mains before they broke, instead adopting a "wait until it breaks" method of replacing pipes. Pac. Bell, 96 Cal. Rptr. 2d at 902, 908. The City's water main replacement policy seeks to replace the worst areas first. The worst areas are found by first monitoring the number of breaks in a particular area. The City presented evidence that no normal procedure can prevent water main breaks and leaks, so the City's policy helps it guard against breaks. The policy examines factors such as breaks per city block, recent break history, age of the water main, and the type of main. Therefore, the City's replacement policy is more thorough than San Diego's procedure in Pacific Bell, in which San Diego replaced water mains only when they broke. The City does what is in its power to guard against breaks by addressing the locations that need replacement the most. Therefore, Pacific Bell and McMahan's are distinguishable, and the City has not committed any deliberate act to take or damage the Knutsons' property. The Knutsons' inverse condemnation claim fails as a matter of law, and summary judgment is appropriate.

IV

[¶16] The Knutsons argue the district court erred in dismissing their trespass claim, because they argue they can establish each element of trespass. For trespass, the plaintiff must establish the defendant intentionally entered the land of another, or caused a thing or third person to do so, without the consent of the landowner. Tibert v. Slominski, 2005 ND 34, ¶ 15, 692 N.W.2d 133 (citing McDermott v. Sway, 78 N.D. 521, 529-30, 50 N.W.2d 235, 240 (1951)). "If there is no intent or 'affirmative voluntary act' by the alleged wrongdoer, there cannot be a claim for trespass." Id.

[¶17] The City has not engaged in an affirmative voluntary act to enter the Knutsons' land or to cause water to enter the Knutsons' land. Because the City had authority to lay the water main in 1950, installing the water mains cannot support a trespass claim. The water main was installed without a system to directly monitor deterioration, but the record reflects that no maintenance or repair procedure will prevent water mains from breaking. Therefore, no intentional act on the part of the City caused the water to enter the Knutsons' property. Because the intent element of trespass is lacking, the trespass claim fails as a matter of law, and summary judgment is appropriate.

V

[¶18] The Knutsons argue the district court erred when it held our opinion in Olson v. City of Garrison, 539 N.W.2d 663 (N.D. 1995), was dispositive and concluded the Knutsons' negligence claim was barred by discretionary immunity. Section 32-12.1-03(3), N.D.C.C., provides, in part:

> A political subdivision or a political subdivision employee may not be held liable under this chapter for any of the following claims:
>
> . . . .
>
> d. The decision to perform or the refusal to exercise or perform a discretionary function or duty, whether or not such discretion is abused and whether or not the statute, charter, ordinance, order, resolution, regulation, or resolve under which the discretionary function or duty is performed is valid or invalid.

Therefore, public entities cannot be sued in negligence for discretionary functions or duties. N.D.C.C. § 32-12.1-03(3)(d).

[¶19] In Olson, in which a water main broke and flooded the basement of a business, we held the City of Garrison's operation and maintenance of its water mains was covered by discretionary immunity. 539 N.W.2d at 668. We adopted the discretionary immunity test applied by the United States Supreme

Court in Berkovitz v. United States, 486 U.S. 531 (1988), to decide whether a governmental act was immune under the Federal Tort Claims Act: (1) "'whether the action is a matter of choice for the acting employee,'" and (2) "'whether that judgment [or choice] is of the kind that the discretionary function exception was designed to shield.'" Olson, at 666, 667 (quoting Berkovitz, 486 U.S. at 536). Garrison considered several factors when maintaining its water mains, including "the historical performance of the water main, the cost of repairing versus replacing the water main, the ability of the City to participate in grants or federally aided projects, and the condition of overlying streets." Id. at 667. We concluded the weighing of the factors by city officials involved a matter of judgment, and Garrison was motivated by economic and social considerations when it decided how to maintain its water mains. Id. at 667, 668. Therefore, discretionary immunity barred the Olsons' claim that Garrison negligently maintained its water mains. Id. at 668.

[¶20] The Knutsons' case is almost identical to Olson. The City is charged with operating and maintaining its water mains. As part of the water main maintenance plan, the City has developed a policy to help decide when it should replace a water main. Regarding day-to-day maintenance, the City presented undisputed evidence that no normal procedure can prevent water main breaks and leaks. Factors the City considers when deciding what mains to replace include breaks per city block, recent break

history, age of the water main, and the type of main. Economic resources are also evaluated in the decision. The City's maintenance program balances economic and social costs and benefits such as cost of replacement, street conditions, the public's disruption, and the public's cost to find the most appropriate time to replace mains. Therefore, the City exercises its judgment when deciding what mains to replace. As in Olson, this operation and maintenance is the kind of function that discretionary immunity is designed to shield from second-guessing. Discretionary immunity bars the Knutsons' negligence claim, so summary judgment is appropriate.

VI

[¶21] The judgment of the district court is affirmed.

[¶22] Dale V. Sandstrom
Daniel J. Crothers
Mary Muehlen Maring
Gerald W. VandeWalle, C.J.

Kapsner, Justice, concurring in the result.

[¶23] I concur in the result reached by the majority opinion. I am troubled with the Court's conclusion in ¶ 15 that a policy deciding when to make replacements of unlined cast iron pipes does not constitute a deliberate act. Such a policy was clearly made after considerable deliberation and was then acted upon. Damages caused when such a policy

fails could subject a city to liability under a theory of inverse condemnation. See, e.g., California State Auto. Ass'n v. City of Palo Alto, 41 Cal. Rptr. 3d 503, 509 (Cal. Ct. App. 2006) (discussing Pacific Bell v. City of San Diego, 96 Cal. Rptr. 2d 897 (Cal. Ct. App. 2000) and concluding damage caused from sewage backup was recoverable under inverse condemnation theory despite deliberately conceived policy of sewer maintenance).

[¶24] Instead of concluding a maintenance policy is not a deliberate act, I would follow our past cases. As the majority opinion correctly points out, our cases require a showing that a municipality's actions, in maintaining a public utility or improvement, reach a level of nuisance before a municipality is liable for damage to property under inverse condemnation. See majority opinion supra, at ¶ 11 (citing Jamestown Plumbing & Heating Co. v. City of Jamestown, 164 N.W.2d 355 (N.D. 1968); Kinnischtzke v. City of Glen Ullin, 79 N.D. 495, 57 N.W.2d 588 (1953)). Although nuisance may be a separate cause of action, a nuisance will also support a claim of inverse condemnation.

[¶25] The City of Fargo's actions did not rise to the level of a nuisance. This claim was based upon a single instance of flooding. Therefore, I concur with the result but not the legal analysis of the majority opinion.

[¶26] Carol Ronning Kapsner

IN DISTRICT COURT, COUNTY OF CASS,
STATE OF NORTH DAKOTA

Douglas F. Knutson
and Linda F. Knutson,

Civil File No. 09-05-C-01720

Plaintiffs,

vs. **MEMORANDUM OPINION AND ORDER**

City of Fargo, North Dakota,
a municipal corporation,

Defendant.

The above-entitled matter comes before the Court on the parties' cross-motions for summary judgment. In this lawsuit, the Plaintiffs claim that on July 8, 2003, a water main owned by the City of Fargo broke next to the property of the Plaintiffs, which caused structural damage to the Plaintiffs' home. Count One of the Complaint alleges a theory of trespass. Count Two of the Complaint alleges that the Plaintiffs' property has been "taken or damaged for public use", within the meaning of Article I, §16 of the Constitution of North Dakota.

Plaintiff seeks a partial summary judgment on the issue of liability claiming that the City's liability for trespass and for either eminent domain or inverse condemnation can be determined as a matter of law.

The City of Fargo in turn has made a cross-motion for summary judgment asserting that the acts of the City of Fargo do not constitute either eminent domain or inverse condemnation, and that the City has discretionary immunity from any of the tort claims being asserted by the Plaintiffs.

Summary judgment is a procedural device for promptly disposing of a lawsuit without a trial if there are no genuine issues of material fact or inferences which can reasonably be drawn from undisputed facts, or if the only issues to be resolved are questions of law. Riverside Park Condominiums Unit Owners Assoc. v. Lucas, 2005 ND 26, 1 8, 691 N.W.2d 862, 869. In considering a motion for summary judgment, the Court must view the evidence in the light most favorable to the party opposing the motion. Skjervern v. Minot State Univ., 2003 ND 52, 1 4, 658N.W.2d 750, 751. Summary judgment is appropriate when a party fails to establish the existence of a factual dispute on an essential element of his claim for which he bears the burden of proof at trial. Collette v. Clausen, 2003 ND 129, ¶ 8, 667 N.W.2d 617, 620. As a general rule, conclusionaryallegations are not sufficient to preclude summary judgment. State Bank of Kenmare v. Lindberg, 471 N.W.2d 470, 476 (N.D. 1991).

The North. Dakota Supreme Court in discussing civil trespass has stated as follows:

> Civil trespass is a common law tort in North Dakota and is not statutorily

> defined. This court has defined trespass as an "'an intentional harm,'" where a person "intentionally and without a consensual or other privilege . . . enters land in possession of another or any part thereof or causes a thing or third person to do so." ... If there is no intent or "affirmative voluntary act" by the alleged wrongdoer, therecannot be a claim for trespass.

Tibert v. Sleminski, 2005 ND 34, ¶ 15, 692 N.W.2d 133, 137 *(quoting* McDermott v. Sway, 50 N.W2d 235, 240 (N.D. 1951).

In this case, the Plaintiffs have not alleged that the City of Fargo had any intention to have the water main break to cause the damage to the Plaintiffs' home, or that they committed any affirmative voluntary act for that to happen. Rather, the Plaintiffs allege in the complaint that the City was negligent. But negligent trespass is not recognized in North Dakota. Accordingly, the Court concludes that Plaintiffs' trespass claim fails as a matter of law on the grounds that an essentialelement, namely intent or an affirmative voluntary act, cannot be established.

In Count Two of Plaintiffs' Complaint, they rely upon Article I, § 16 of the Constitution of North Dakota which provides in part as follows:

> Private property shall not be taken or

> damaged for public use without just compensation having first been first made to, or paid into court for the owner, unless the owner chooses to accept annual paymentsas may be provided for by law.

Plaintiffs have alleged theories of eminent domain and inverse condemnation. Eminent domain is simply not applicable here. The City of Fargo has not started any eminent domain proceedings. Rather, the more appropriate theory here would be that of inverse condemnation. "Inverse condemnation" is a shorthand description for a landowner's suit to recover just compensation for governmental taking of the landowner's property without benefit of condemnation proceedings. Lockard v. Nebraska Public Power Distrib.' s, 546 N.W .2d 824, 827 (Neb. App. 1996). Furthermore, a claim for inverse condemnation, authorized by the State Constitution, is not barred by tort immunity of public officials for discretionary acts and decisions. Minch v. City of Fargo, 297 N.W.2d 785, 789 (N.D.1980).

In Hamilton v. City of Bismarck, 300 N.W. 631 (N.D. 1941), the Court addressed an inversecondemnation claim arising from an overflow of a sanitary sewer that damaged the plaintiff's property. The Court stated as follows:

> [W]e distinguish between an action for damages based upon negligence and an action based upon damage to private

> property for public use within the purview of Section 14 of the Constitution. That section of the Constitution does not bear upon damages resulting from negligence of public corporations or their agents; it deals withthose damages that would normally flow from the exercise of the power of eminent domain.

Id. at 633-34. This implies that for inverse condemnation to provide a remedy to the Plaintiffs, the City of Fargo must have performed some affirmative act similar to exercising the power of eminentdomain. Here, the City has done nothing like that and there's no allegation that it did. Plaintiffs' claim against the City is primarily a negligence claim, arguing that the City failed to properly maintain the water lines allowing them to deteriorate and then burst.

As a matter of law, the Plaintiffs have failed to establish a necessary element of inverse condemnation, that is, some affirmative act by the City that is equivalent to exercising its power of eminent domain.

In Defendant's motion for summary judgment, it is argued that to the extent any negligence claims are being made against the City, the City has discretionary immunity protecting it from that claim.

As stated earlier, Plaintiffs' complaint in

Count One does make allegations of negligence in conjunction with the trespass claim. To the extent that those negligence claims are separate and apart from the trespass claim, which the Court has already determined has no merit, the Court agrees with the City's position that the City has discretionary immunity protecting it from those claims of negligence.

The North Dakota Supreme Court's decision in Olson v. City of Garrison, 539 N.W.2d 663 (N.D. 1995), is dispositive. There, a water main broke causing flooding in the Plaintiff' s basement. Id. at 664. The Olson's brought a tart action against the City for damages alleging negligence. Id. Section 32-12.1-03(3) of the North Dakota Century Code reads in part as follows:

> "3. A political subdivision or a political subdivision employee may not be held liable under this chapter for any of the following claims:
>
> . . .
>
> d. The decision to perform or the refusal to exercise or perform a discretionary function or duty, whether or not such discretion is abused and whether or not the statute, charter, ordinance, order, resolution, regulation, or

> resolve under which the discretionary function or duty is performed is valid or invalid."

The record in the Olson case established that the city did consider various factors when making decisions about the operation and maintenance of its water mains. As the Court in Olson stated, the purpose of the discretionary function exception is to 'prevent judicial second guessing of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort.'" Id. at 667 (*quoting* Berkovitz v. United States, 486 U.S. 531, 536-37). The court noted that the decisions concerning the conduct of the city turned not on objective standards but rather on public policy considerations. Id. The court concluded that the City of Garrison's conduct fell within the discretionary function exception. Id. at 668.

Here, too, the City's determination of what water mains to fix and when to fix them was not based upon objective standards, but was based upon economic considerations. This is established by the unrefuted affidavits of Dennis Walaker and Mark Bittner. Dennis Walaker, the Director of Operations for Fargo Public Works, swore in an affidavit that the City's water main maintenance program prioritizes the water main replacements based on the number of water main breaks per block. Mark Bittner, the City Engineer for the City of Fargo, swore in his affidavit

that in replacing older cast iron pipes, the City's policy takes into consideration various sources of funding, the sequencing of street replacement and the availability of funds from grants.

Clearly, the City of Fargo's operation and maintenance of its water main system is a type intended to be shielded by the discretionary function exception.

On the basis of the foregoing, IT IS HEREBY ORDERED that Plaintiffs' Motion for Partial Summary Judgment is DENIED.

IT IS FURTHER ORDERED that Defendant's Motion for Summary Judgment is GRANTED.

IT IS FURTHER ORDERED that judgment be entered dismissing Plaintiffs' Complaint together with awarding the Defendant its costs and disbursements herein.

Dated this 14th day of September, 2005.

BY THE COURT:

/s Steven L. Marquart
Steven L. Marquart
Judge of District Court
East Central Judicial District

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 08-1894

Douglas R. Knutson and Linda F. Knutson
Appellants

v.

City of Fargo, a municipal Corporation
Appellee

Appeal from U.S. District Court for the District of North Dakota - Fargo

(3:07-cv-00068-RRE)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

May 19, 2010

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

s/ Michael E. Gans

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No: 08-1894

Douglas R. Knutson and Linda F. Knutson

Appellants

v.

City of Fargo, a municipal Corporation

Appellee

Appeal from U.S. District Court for the District of North Dakota - Fargo

(3:07-cv-00068-RRE)

MANDATE

In accordance with the opinion and judgment of 04/12/2010, and pursuant to the provisions of Federal Rule of Appellate Procedure 41(a), the formal mandate is hereby issued in the above-styled matter.

May 27, 2010

Clerk, U.S. Court of Appeals, Eighth Circuit

United States District Court
District of North Dakota
Southeastern Division

Douglas R. Knutson and Linda F. Knutson

v.

City of Fargo, a municipal corporation

AMENDED JUDGMENT
IN A CIVIL CASE

Case No.: 3:07 CV 68

X **Decision by Court**. This action came before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED: Pursuant to the mandate of the Eighth Circuit Court of Appeals, this matter is dismissed with prejudice.

Date: May 27, 2010

ROBERT J. ANSLEY, CLERK OF COURT

by s/ Lisa Clark

UNITED STATES DISTRICT COURT
FOR THE SOUTHEASTERN DIVISION
DISTRICT OF NORTH DAKOTA

Douglas R. Knutson and
Linda F. Knutson,

Case number: 3:07cv68

Plaintiffs,

vs. **COMPLAINT**

City of Fargo,
a municipal corporation,

Defendant.

1. Plaintiffs, Douglas R. Knutson and Linda F. Knutson, are citizens of the United States of America and reside at 1024 1st Avenue North, Fargo, North Dakota 58102.

2. Defendant, City of Fargo, is a municipal corporation organized under the laws of the State of North Dakota.

3. This action arises under the Constitution of the United States of America, particularly under the provisions of the Fourth, Fifth, and Fourteenth Amendments to the

Constitution of the United States, and under federal law, particularly the Civil Rights Act, Title 42 of the United States Code, Section 1983.

4. This Court has jurisdiction of this cause under and by virtue of Title 28 of the United States Code, Sections 1331 and 1343.

5. Each and all of the acts or conduct of the Defendant, that deprived Plaintiffs of their rights, privileges and immunities secured by the Federal Constitution and laws, were done under color of statutes, regulations, customs or usages of the State of North Dakota and ordinances, regulations, customs or usages of the Defendant City of Fargo.

6. Prior to July 8, 2003, the City of Fargo determined that its cast iron water mains were deteriorating and adopted a policy to eventually replace all of its cast iron water mains with plastic piping with an approximate replacement goal of four miles per year. Prior to July 8, 2003, the City of Fargo's adopted official policy for water main replacement was based upon the number of water main breaks per block, recent break history, age of the water main, and type of water main. Under the City of Fargo's adopted water main replacement policy, no cast iron water main was recommended to be replaced until the water main had experienced twelve (12) breaks per block unless there was a need for street improvements or increased water supply needs. Other than monitoring the number of breaks

a water main has experienced, the City of Fargo utilizes no other method or program to monitor the inevitable deterioration of its cast iron water mains.

As of July 8, 2003, the City of Fargo did not have a maintenance program for their deteriorating cast iron water mains. As of that date, the City of Fargo merely monitored the location and frequency of the water main breaks within their cast iron water main system and fixed breaks as they occurred.

7. At all times material to this Complaint, Plaintiffs were, and still are, the owners and in possession of the following described real property [home] located at 1024 1st Avenue North, Fargo, North Dakota 58102, and legally described as follows, to wit:

> The West Thirty-six (36') feet of Lots Five (5) and Six (6) in Block Six (6) of Robert's Second Addition to the City of Fargo, State of North Dakota.

8. On July 8, 2003, and due to the official policy adopted by the City of Fargo for maintaining its cast iron water main system, one of the City of Fargo's deteriorated cast iron water mains lying adjacent to the real property [and home] broke causing pressurized water to rush from the City of Fargo's cast iron pipe and flow upon Plaintiffs' real property. The surge of pressurized rushing water upon Plaintiffs caused direct, permanent, and substantial structural damage to Plaintiffs' home

located upon the above described real property and permanent and substantial damage to Plaintiffs' yard. The direct structural damage caused by the leakage from the breakage to the water main included, but is not necessarily limited to, damage to the foundation, sidewalk on the property, destruction of the fence on the property, and the need for fill within the yard to replace damaged soil.

9. The entry of the rushing pressurized waters, from the breaking water main, upon Plaintiffs' property was against the will and without the consent of the Plaintiffs and constituted a meaningful interference with the Plaintiffs' possessory interests in their property and home.

10. That the proximate damages caused by the acts and conducts of the Defendant described above include necessary repairs to the Plaintiffs' basement and Plaintiffs' home, yard and fence, the loss of Plaintiffs' productive time, and Plaintiffs' inconvenience and annoyance.

11. The reasonable expense necessary for the structural repair to Plaintiffs' real property caused by Defendant's conduct and direct intrusion totals $12,130.00. The reasonable expense necessary for the repair of the damage to the Plaintiffs' yard and fence due to the Defendant's trespass, or negligence, totals $2,296.00. Reasonable reimbursement for the loss of Plaintiffs' productive time, inconvenience, and annoyance is not less than $5,000.00.

12. That the City of Fargo's conduct, including its adopted policy concerning cast iron water main replacement and maintenance thereof, has deprived the Plaintiffs of their right to be secure in their house and effects guaranteed by the Fourth and Fourteenth Amendments to the Constitution of the United States of America. That the surge of pressurized water upon Plaintiffs' lands, a foreseeable risk from the City of Fargo's adopted policies, is a seizure of Plaintiffs' house and effects in that the City of Fargo's conduct meaningfully, and unreasonably, interfered with Plaintiffs' possessory interests in their house and effects.

13. The physical invasion of Plaintiffs' home and lands, by the City of Fargo's pressurized waters, caused direct and substantial damage to Plaintiffs' home and property, as described above. The direct and substantial damages Plaintiffs suffered due to the physical invasion of the pressurized water was a direct, natural, or probable consequence of the City of Fargo's adopted policy concerning its cast iron water main system.

The City of Fargo deliberately shifted the risk of loss and burden of government, for deteriorating cast iron water mains, unto adjacent landowners like the Plaintiffs based upon the following deliberate choices made by said Defendant: (i) the selection an unlined cast iron pipe as a conduit for its domestic water supply; (ii) the placement of the cast iron water main underground where monitoring and maintenance are limited; (iii) the choice of not

making any studies to determine the rate of deterioration of its cast iron water mains; (iv) the decision not to make any maintenance because of a determination that there are no **normal** maintenance plans available; (v) the decision to not immediately replace its cast iron water mains upon determining that they were in need of replacement; and (vi) setting a schedule of twenty years' time to replace its cast iron water mains.

The physical invasion of Plaintiffs' land and resulting direct and substantial damages to Plaintiffs' home and lot, due to the consequence of official policy of the City of Fargo, constitutes a taking within the meaning of the Fifth Amendment to the Constitution of the United States of America entitling the Plaintiffs to just compensation for their losses to their property. Plaintiffs are entitled to just compensation for the diminishment in value caused by said physical invasion of their land which diminishment in value should be no less than the necessary cost of $14,446.00 and Plaintiffs' loss of productive time due to the physical invasion of Plaintiffs' land.

14. Prior to this lawsuit, the Plaintiffs have exhausted all state remedies to obtain just compensation for their losses as is more fully shown in the reported case entitled Knutson v. City of Fargo, 2006 ND 97, 714 N.W.2d 44, and the state remedies were unavailing. In exhausting their state remedies, a necessary process to preserve their federal right to just compensation guaranteed to

them by the Fifth and Fourteenth Amendments to the United States Constitution, the Plaintiffs incurred attorney fees, court costs, and other expenditures, and suffered a loss of their own productive time [as first alleged in paragraph 11 above]. The court costs incurred by Plaintiffs included an $80.00 filing fee in state district court, a $125.00 fee in the North Dakota Supreme Court, $13.50 in sheriff's fees, and assessed costs against them of $60.00 for a total fees and costs incurred at state level to pursue Plaintiffs' state claims for just compensation of $278.50. The reasonable value of attorney fees necessarily incurred by Plaintiffs to pursue their state claim for just compensation, and preserve their federal right to just compensation, is $12,500.

15. The City of Fargo's acts of conduct have denied Plaintiffs substantive due process of law, procedural due process of law, and the equal protection of the law in violation of Plaintiffs' rights guaranteed them under the Fourteenth Amendment to the Constitution of the United States of America. The deprivation of Plaintiffs' Fourteenth Amendment rights include, but are not necessarily limited to the following:

a. Plaintiffs' possessory and enjoyment rights in real property are entitled to substantive due process protection. The City of Fargo's replacement and maintenance policy concerning its deteriorating cast iron water main

system deliberately shifted the risk of loss and the cost of government to the Plaintiffs as adjoining landowners. Defendant's policy, concerning its deteriorating cast iron water system, demonstrates a deliberate indifference to Plaintiffs' right to possess and enjoy their real property and is shocking to the conscience. Defendant's deliberate indifference to Plaintiffs' constitutionally protected rights to enjoy their real property is further evidenced by Defendant's failure to secure appropriate insurance to protect adjoining landowners from the risk that the City of Fargo created.

b. The City of Fargo, under color of law, customs, or usages, has deprived Plaintiffs of property without procedural due process of law. There is no meaningful state or municipal procedure or process that is available to Plaintiffs that adequately safeguards Plaintiffs' constitutionally protected right to possess and enjoy their home and lands free from governmental intrusion nor available process to compensate the Plaintiffs for the destruction of Plaintiffs' property due to the City of Fargo's adopted policy concerning its cast iron water main system.

c. The City of Fargo, under color of law, customs, or usages, has deprived Plaintiffs of the equal protection of the laws and their fundamental privilege to possess and enjoy real property in the following ways: (i) by overly broad statutes granting discretionary immunity to the City of Fargo for intrusions upon Plaintiffs' constitutionally protected interests in their home and land based upon an arbitrary, capricious, and unreasonable classification as to the entity insuring the City of Fargo's acts; (ii) by unreasonable classifications concerning the injury to Plaintiffs' real property interests [*i.e.*, denial of recovery of inverse condemnation award to Plaintiffs because Plaintiffs' claim stems from the first governmental intrusion that caused direct and consequential damages rather than a continuing nuisance causing consequential damages]; and (iii) by imposing an unequal and unfair burden upon Plaintiffs, as landowners whose real property has been damaged, to bear the cost of municipal policies.

16. Plaintiffs are entitled to their attorney fees for bringing this action to vindicate their civil rights under the provisions of 42 U.S.C. § 1988.

WHEREFORE, the Plaintiffs pray for judgment against the Defendant in the amount of $19,426.00 for their damages for their constitutional deprivations or for their diminution of value of their property, with interest thereon; their reasonable attorney fees and costs necessarily incurred in state court to preserve their federal right to just compensation in the total amount of $12,778.50; their costs and disbursements and reasonable attorney fees incurred in this lawsuit; and such other and further relief as is just and equitable in the premises.

Dated this 23rd day of July, 2007.

GARAAS LAW FIRM

s/ David Garaas
David Garaas
Attorneys for Plaintiffs
DeMores Office Park
1314 23rd Street South
Fargo, North Dakota 58103-3796
Telephone: (701)293-7211
North Dakota Bar ID # 03219

UNITED STATES DISTRICT COURT FOR THE
SOUTHEASTERN DIVISION
DISTRICT OF NORTH DAKOTA

Douglas R. Knutson and
Linda F. Knutson,

Case number: 3:07cv68

Plaintiffs,

vs. **AFFIDAVIT OF DOUGLAS R. KNUTSON**

City of Fargo,
a municipal corporation,

Defendant.

State of North Dakota

County of Cass

Douglas R. Knutson, being first duly sworn on oath, states that he the husband of Linda F. Knutson and that he and his wife, Linda, are the Plaintiffs in the above entitled action. Your Affiant makes this Affidavit to show that this federal civil rights case is not barred under the Rooker-Feldman doctrine nor barred by res judicata [claim preclusion] or collateral estoppel [issue preclusion] due to the prior North Dakota state lawsuit referred to in the Defendant's Rule 12(c) motion. Through this affidavit, it is my hope to show this Court that your Affiant and Linda

F. Knutson's right to pursue this federal civil rights lawsuit did not arise until **after** they initiated their North Dakota state court action. Your Affiant states the claims made in this lawsuit are not the same claims presented in the North Dakota lawsuit and that the factual elements that allow your Affiant and his wife to pursue a federal civil right action did not arise until after he and his wife initiated the former state action. Your Affiant states that the issues presented in this lawsuit are not identical to the issues that were presented to the North Dakota courts. Your Affiant further states that the manner in which the facts and/or conclusions of law developed in the North Dakota proceedings prevented your Affiant and his wife from presenting their federal issues to the North Dakota courts in a fair and meaningful manner.

Affiant attaches to this Affidavit the following documents:

1. A copy of the Brief of Plaintiffs-Appellants;

2. A copy of the Appendix to the Brief of Plaintiffs-Appellants;

3. A copy of the Brief of Defendant-Appellee;

4. A copy of the Reply Brief of Plaintiffs-Appellants; and

5. A copy of the Petition for Rehearing.

The purpose of these copies is to show that not one federal concept was relied upon by your Affiant or his wife in the North Dakota lawsuit in our failed attempt to seek just compensation through state proceedings. Neither your Affiant nor his wife - nor the City of Fargo - relied upon federal concepts. The District Court Judge who dismissed your Affiant's North Dakota lawsuit did not rely on federal law or federal concepts when dismissing our state lawsuit. The Supreme Court of the State of North Dakota did not rely upon federal law nor federal concepts when it issued its opinion that denies just compensation to me and my wife.

Facts Relating to Fifth Amendment Violation

Your Affiant also sets forth the following facts showing that there has been a denial of just compensation for a "taking" within the meaning of the Fifth Amendment to the Constitution of the United States of America:

1. At all times material to this federal civil rights lawsuit, your Affiant and wife, Linda, were, and still are, the owners and in possession of the following described real property [home] located at 1024 1st Avenue North, Fargo, North Dakota 58102, and legally described as follows, to wit:

> The West Thirty-six (36') feet of Lots Five (5) and Six (6) in Block Six (6) of

Robert's Second Addition to the City of Fargo, State of North Dakota.

This real property is the homestead of your Affiant and his wife.

2. Prior to July 8, 2003, the City of Fargo determined that its cast iron water mains were deteriorating and adopted a policy to eventually replace all of its cast iron water mains with plastic piping with an approximate replacement goal of four miles per year. Prior to July 8, 2003, the City of Fargo's adopted official policy for water main replacement was based upon the number of water main breaks per block, recent break history, age of the water main, and type of water main. Under the City of Fargo's adopted water main replacement policy, no cast iron water main was recommended to be replaced until the water main had experienced twelve (12) breaks per block unless there was a need for street improvements or increased water supply needs. Other than monitoring the number of breaks a water main has experienced, the City of Fargo utilizes no other method or program to monitor the inevitable deterioration of its cast iron water mains.

As of July 8, 2003, the City of Fargo did not have a maintenance program for their deteriorating cast iron water mains. As of that date, the City of Fargo merely monitored the location and frequency of the water main breaks within their cast iron water main system and fixed breaks as the breaks occurred.

3. On July 8, 2003, and due to the official policy adopted by the City of Fargo for maintaining its cast iron water main system, one of the City of Fargo's deteriorated cast iron water broke causing pressurized water to rush from the City of Fargo's deteriorated cast iron pipe and flow upon our dwelling house and lot. The deteriorated water main that broke on July 8, 2003, was located under a street that lies adjacent to our lot upon which our dwelling house is located.

4. On July 8, 2003, a surge of pressurized rushing water discharged from the deteriorated water main and flowed upon our dwelling house and lot. This surge of pressurized water caused direct, permanent, and substantial structural damage to our home located upon the above described real property and permanent and substantial damage to their yard. The direct structural damage caused by the leakage from the breakage to the water main included, but is not necessarily limited to, damage to the foundation, sidewalk on the property, destruction of the fence on the property, and the need for fill within the yard to replace damaged soil.

5. The July 8, 2003, water main break was not the first time the subject water main broke. The July 8, 2003, water main break is the first and only time that the foundation of our home, our lot [ground] and fence were directly, substantially and permanently damaged. The water main has broken at least two times since July 8, 2003, however the July 8, 2003, event is the only time that our real

property received direct damage that is particular to us and not shared by the general public.

6. The cost to repair the direct, permanent and substantial damage to the foundation of our house, our yard, and our fence in 2003 is as stated in our Complaint. This is evidenced by pages 12 through 15 of the Appendix of the Brief of the Appellants in the proceedings before the Supreme Court of North Dakota. I have personally made some temporary repairs to the foundation to my home by installing some braces to the foundation but my repairs are only temporary in nature. When fully repairing the damage to the foundation, we will need to comply with current building codes and the 2003 cost of construction for the necessary repairs that complies with the applicable 2003 building code is reflected in the bids set forth in said Appendix.

7. The entry of the rushing pressurized waters, from the breaking water main, upon our real property was against our will and without our consent and constituted a meaningful and unreasonable interference with our possessory interests in our property and our home.

8. In July of 2003, a representative of the City of Fargo investigated the water main leak and the direct, permanent and substantial damages that my wife and I sustained. The City of Fargo did not take any responsibility for the direct damages to our home, lot and property due to its broken water main. Prior to the time we initiated our failed state action,

the City of Fargo, through its insurance investigator, claimed their was "no negligence" on the part of the City of Fargo and that our loss was an "act of God type loss due to the shifting of the ground, which eventually will crack/or break water mains." See the letter of July 28, 2003, from Rusty Summers of Crawford and Company to your Affiant, a copy of which is marked Exhibit A, attached hereto and incorporated by reference.

9. Not knowing of any Act of God that would cause shifting grounds in July, 2003, and operating under the belief that the City of Fargo should design its water system to withstand foreseeable ground conditions, my wife and I sued the City of Fargo in state court seeking just compensation for our loss. Our state lawsuit was based upon the common law tort of trespass and Article I, § 16 of the Constitution of North Dakota. See pages 3 through 4 of the copy the Appendix to the Brief of Plaintiffs-Appellants of the Supreme Court of North Dakota proceedings.

10. After we initiated our state action and during the discovery phase of our state action, the City of Fargo revealed to us for the *first* time that the direct damage to our property was not caused by shifting grounds but by a deteriorated water main. See page 26 of the copy the Appendix to the Brief of Plaintiffs-Appellants of the Supreme Court of North Dakota proceedings. After discovery in the state lawsuit, we were the first to move for partial summary judgment basing our theory of recovery in

the state action on the theory of trespass/nuisance and that our property had been "taken or damaged for public use" within the meaning of Article I, Section 16, of the North Dakota Century Code. See pages 9 through 17 of the copy the Appendix to the Brief of Plaintiffs-Appellants of the Supreme Court of North Dakota proceedings.

11. In response to our partial summary judgment motion, the City of Fargo moved the state court for summary judgment on July 14, 2005. The City of Fargo's motion for summary judgment was based solely upon the grounds that the "City of Fargo, is entitled to judgment as a matter of law." With its summary judgment motion, the City of Fargo submitted the affidavits of its then Director of Operations, Dennis Walaker, and its City Engineer, Mark Bittner. Through these affidavits submitted in July, 2005, with its motion for summary judgment, the City of Fargo revealed for the first time of its officially adopted policy concerning the maintenance and replacement of its deteriorating cast iron water mains. Although Answer 13 of the City of Fargo's Answers to Plaintiffs' Interrogatories mentions the City of Fargo's water main policy, it did not enclose a copy of that policy to us [our attorney] with its answers but submitted such policy to us when it moved for summary judgment. See pages 23, 24, and 22 - 47 of the copy the Appendix to the Brief of Plaintiffs-Appellants of the Supreme Court of North Dakota proceedings.

12. The answers to interrogatories and

affidavits of city officials reveal that the City of Fargo deliberately shifted the risk of loss and burden of government, for deteriorating cast iron water mains, unto adjacent landowners based upon the following deliberate choices made by the City: (i) the selection an unlined cast iron pipe as a conduit for its domestic water supply; (ii) the placement of the cast iron water main underground where monitoring and maintenance are limited; (iii) the choice of not making any studies to determine the rate of deterioration of its cast iron water mains; (iv) the decision not to make any maintenance because of a determination that there are no **normal** maintenance plans available; (v) the decision to not immediately replace its cast iron water mains upon determining that they were in need of replacement; and (vi) setting a schedule of twenty years' time to replace its cast iron water mains.

My wife and I did not know of an official policy concerning the maintenance and replacement of the deteriorating water mains until January, 2005, and did not know of the details of the same until the City of Fargo moved for summary judgment in the state proceedings.

13. The state district court judge rejected our argument and dismissed our inverse condemnation action because of his determination that the "City of Fargo must have performed some affirmative act similar to exercising the power of eminent domain." The state district court concluded that the act we complained about was negligence and

would not support an inverse condemnation action. See pages 50-51 of the copy the Appendix to the Brief of Plaintiffs-Appellants of the Supreme Court of North Dakota proceedings. When submitting our North Dakota claim to the state district judge, we did not know that North Dakota's remedy for providing just compensation for a taking was not coextensive with our rights under the Fifth Amendment to the Constitution of the United States of America.

14. We appealed the state district judge's decision to the Supreme Court of North Dakota. The Supreme Court of North Dakota determined that the City of Fargo's adopted cast iron water main policy was not a "deliberate act" that supports a North Dakota inverse condemnation claim even though it also determined the requisite "deliberate act"can be done "intentionally, negligently, or innocently." See Knutson v. City of Fargo, 2006 ND 97 ¶¶ 12-14 , 714 N.W.2d 44. The Supreme Court of North Dakota also distinguished prior North Dakota inverse condemnation case law by determining, "This is a case of one flooding caused by the rupture of one water main, not damage over time." Id., ¶ 14. We petitioned the Supreme Court of North Dakota for rehearing and our petition was denied on June 1, 2006. Again at the time we filed our North Dakota action and at the time we filed our appeal, we did not know that North Dakota's laws relating to a "taking" was not coextensive with federal "taking" law that requires just compensation. Further, until the Supreme Court of North Dakota ruled in our appeal, we did not know – and had no reason to suspect –

that an invasion of land for a public purpose, causing direct and substantial damages to our home, does not need to be compensated under North Dakota law while a nuisance to our home requires compensation. We had no reason to suspect, until the Supreme Court of North Dakota issued its decision, that North Dakota's constitutional requirement for just compensation was not coextensive with the Fifth Amendment to the Constitution of the United States of America.

15. In rejecting our state claim for inverse condemnation, the state district judge and the Supreme Court of North Dakota relied only upon state law. Not one federal case was relied upon by any North Dakota court when our state inverse condemnation claim was rejected. Neither the state district judge nor the Supreme Court of North Dakota suggested that federal law was considered at the time their respective decision was rendered.

16. We have exhausted all available state remedies and were denied "just compensation" by the City of Fargo and the North Dakota judiciary. We respectfully submit that our right to pursue this federal civil rights action for the denial of just compensation, under color of law, arose when our Petition of Rehearing was denied by the Supreme Court of North Dakota on June 1, 2006.

This is not the same claim as made in the North Dakota courts. The North Dakota claim was a claim for compensation under North Dakota law.

This federal claim is a claim for the denial of our right to compensation guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States of America. This federal claim only arose after we were denied just compensation under North Dakota law.

The issues in this federal lawsuit are not identical to the issues in the former state lawsuit. The state action only involved issues of North Dakota law. The issues in this case involve federal issues.

Facts relating to the Fourth Amendment violation.

17. I incorporate by reference paragraphs number 1 through 16 of this affidavit by reference.

18. Some of the operative facts that support our Fifth Amendment civil rights action supports our Fourth Amendment civil rights action and both the Fourth Amendment violations and Fifth Amendment violations should lead to one remedy for our losses. However, our Fourth Amendment civil rights claim is distinct from our Fifth Amendment claim and such distinction stems from language found within Knutson v. City of Fargo, 2006 ND 97, 714 N.W.2d 44 when our common law trespass action, based upon trespass/nuisance principles, was rejected by the Supreme Court of North Dakota. Our common law tort position in state court was that the City of Fargo's maintenance policies allowing the subject cast iron main to deteriorate and cause our real

property damage was a "voluntary" act within the meaning of trespass/nuisance laws – whether that act was done intentionally or negligently. Our theory of trespass/nuisance is found in Point 2, pages 11 through 17, of the Brief of Plaintiff-Appellants attached hereto. Our theory of trespass/nuisance was rejected by the Supreme Court of North Dakota's holding in Knutson v. City of Fargo, *supra.*, in ¶17 of said decision:

> [¶17] The City has not engaged in an affirmative voluntary act to enter the Knutsons' land or to cause water to enter the Knutsons' land. Because the City had authority to lay the water main in 1950, installing the water mains cannot support a trespass claim. The water main was installed without a system to directly monitor deterioration, but the record reflects that no maintenance or repair procedure will prevent water mains from breaking. Therefore, no intentional act on the part of the City caused the water to enter the Knutsons' property. Because the intent element of trespass is lacking, the trespass claim fails as a matter of law, and summary judgment is appropriate.

Until the Supreme Court of North Dakota determined that the authority to lay water mains under a street is authority to invade our home and

land, my wife and I did not believe that the invasion was "under color of law" [other than what is protected by the Fifth Amendment to the Constitution of the United States]. In other words, our civil rights action under the Fourth Amendment arises only when the governmental invasion of home by the City's pressurized water is under "color of law" – determined and brought into issue for the first time on appeal in the state proceedings. Because this "color of law" arises at the appellate level – when the Supreme Court of North Dakota acquiesces in the dismissal of the common law tort of trespass/nuisance – my wife and I did not have a fair and meaningful opportunity to present our Fourth Amendment claim to the state courts.

Facts relating to our Fourteenth Amendment Claims

19. I incorporate by reference all operative facts set forth with paragraphs number 1 through 18 of this affidavit.

20. The subject real property involves our dwelling-house and its common law curtilage. I respectfully submit that my right, and my wife's right, to exclude the city government from our dwelling-house and its curtilage is one of the bundle of sticks in the ownership of real property that is worthy of substantive due process protection. I respectfully submit that I and my wife have a fundamental right under the Fourth Amendment to be free of unreasonable governmental interferences

with our possessory interests into our home [dwelling-house]. I respectfully submit that I and my wife have a fundamental right under the Fifth Amendment to be justly compensated for the taking of our private property.

I respectfully submit that my wife and I were deprived by the City of Fargo and North Dakota legislation of substantive due process of law and equal protection of the law guaranteed by the Fourteenth Amendment of the Constitution of the United States of America. I respectfully submit that the state courts acquiesced in the denial of due process of law and the denial of equal protection of the law by their rulings that create classifications as to North Dakota law that do not survive strict scrutiny.

21. I further respectfully submit that the former state action conclusively establishes that my wife and I did not have any adequate post-deprivation remedy under North Dakota law because of overly broad statutory immunities or overly broad classifications created by the North Dakota courts in their interpretation of North Dakota law.

22. In this federal civil rights action, my wife and I seek relief from the deprivation of our possessory rights to real property that are protected by the Fourteenth Amendment to the Constitution of the United States of America. My wife and I respectfully submit that our possessory interests in real property include a right to be free of a

government created danger. We further respectfully submit that my wife and I should not be singled out and burdened financially with a governmental decision not to replace a governmentally determined deteriorated cast iron water main system. We respectfully submit that the Fourteenth Amendment protects us from having to singly shoulder the costs of government that should be borne by the public in general.

23. My wife and I respectfully submit that all necessary elements to assert a Fourteenth Amendment violation did not exist until after we filed our state lawsuit. Certain elements of this federal civil rights action, based upon Fourteenth Amendment violations, stem from the Supreme Court of North Dakota's decision in Knutson v. City of Fargo, *supra.*, that creates classifications of North Dakota common law that do not survive strict scrutiny. Other elements of our Fourteenth Amendment claims arise only after the City of Fargo invokes its claim, by its state Answer, that it has discretionary immunity and the state court system acquiesces in such claim of immunity and thus depriving us of any meaningful post-deprivation remedy.

24. To help show when Fourteenth Amendment civil rights violations occurred, I set forth the following paragraph of my federal complaint:

> 15. The City of Fargo's acts of conduct have denied Plaintiffs

substantive due process of law, procedural due process of law, and the equal protection of the law in violation of Plaintiffs' rights guaranteed them under the Fourteenth Amendment to the Constitution of the United States of America. The deprivation of Plaintiffs' Fourteenth Amendment rights include, but are not necessarily limited to the following:

a. Plaintiffs' possessory and enjoyment rights in real property are entitled to substantive due process protection. The City of Fargo's replacement and maintenance policy concerning its deteriorating cast iron water main system deliberately shifted the risk of loss and the cost of government to the Plaintiffs as adjoining landowners. Defendant's policy, concerning its deteriorating cast iron water system, demonstrates a deliberate indifference to Plaintiffs' right to possess and enjoy their real property and is shocking to the

conscience. Defendant's deliberate indifference to Plaintiffs' constitutionally protected rights to enjoy their real property is further evidenced by Defendant's failure to secure appropriate insurance to protect adjoining landowners from the risk that the City of Fargo created.

b. The City of Fargo, under color of law, customs, or usages, has deprived Plaintiffs of property without procedural due process of law. There is no meaningful state or municipal procedure or process that is available to Plaintiffs that adequately safeguards Plaintiffs' constitutionally protected right to possess and enjoy their home and lands free from governmental intrusion nor available process to compensate the Plaintiffs for the destruction of Plaintiffs' property due to the City of

Fargo's adopted policy concerning its cast iron water main system.

c. The City of Fargo, under color of law, customs, or usages, has deprived Plaintiffs of the equal protection of the laws and their fundamental privilege to possess and enjoy real property in the following ways: (i) by overly broad statutes granting discretionary immunity to the City of Fargo for intrusions upon Plaintiffs' constitutionally protected interests in their home and land based upon an arbitrary, capricious, and unreasonable classification as to the entity insuring the City of Fargo's acts; (ii) by unreasonable classifications concerning the injury to Plaintiffs' real property interests [*i.e.*, denial of recovery of inverse condemnation award to Plaintiffs because Plaintiffs' claim

> stems from the first governmental intrusion that caused direct and consequential damages rather than a continuing nuisance causing consequential damages]; and (iii) by imposing an unequal and unfair burden upon Plaintiffs, as landowners whose real property has been damaged, to bear the cost of municipal policies.

25. At the time we initiated our state action, we were only informed by the representatives of the City of Fargo that their was "no negligence" on the City's part and that the water main break and our loss was "due to the shifting of the ground." See the letter of July 28, 2003, from Rusty Summers of Crawford and Company to your Affiant, a copy of which is marked Exhibit A, attached hereto and incorporated by reference. Not knowing of any Act of God and believing that the City's water main system should be constructed in a manner that withstands a summer shifting of ground [if any exists], we sued in state court under the theories of trespass and inverse condemnation based only upon state law principles.

26. The City of Fargo first raised the issue of discretionary function immunity by its Answer in

the state action. See pages 7 and 8 of the copy of the Appendix to the Brief of Plaintiffs-Appellants. Under North Dakota law, a city's insurer cannot claim governmental immunity. See, N.D.C.C. § 32-12.1-05. Under North Dakota law, a city participating in a governmental self-insurance pool is not considered to have waived governmental immunity. See, N.D.C.C. § 26.1-23.1-02. After the discovery phase of our state action, we first learned of the City of Fargo's determination that its cast iron water main system was deteriorating and in need of replacement and of its decision to subject neighboring landowners – such as me and my wife –to as many as 12 water main breaks before replacement is mandated. The City of Fargo has no maintenance policy for its deteriorating water main system other than to repair breaks as they occur and the monitoring of the location and frequency of the water main breaks. The Supreme Court of North Dakota acquiesced in this policy, that deprives us of real property rights, by sustaining the City of Fargo's claim of discretionary immunity. In sustaining the dismissal of our state action, the Supreme Court of North Dakota determined that it could distinguish our inverse condemnation action from prior case law because: "This is a case of one flooding caused by the rupture of one water main, not damage over time." Knutson v. City of Fargo, *supra.*, ¶ 14.

27. I respectfully submit that our Fourteenth Amendment civil rights action did not accrue until after the Supreme Court of North Dakota acquiesced in the deprivation of our

Fourteenth Amendment rights as evidenced by its decision. I respectfully submit that the denial of our Fourteenth Amendment rights that are involved in this civil rights action could not be anticipated at the time we initiated our state action.

_____

Douglas R. Knutson

Subscribed and sworn to before me this 7th day of September, 2007.

_____

Notary Public

Crawford®
David W. Radel
Branch Manager

July 28, 2003

Mr. Douglas Knutson
1024 1st Avenue North
Fargo, ND 58102

RE:	Insured:	City of Fargo
	Claim #:	11491350
	Claimant:	Douglas Knutson
	ID/Loss:	7-08-03
	Our File:	219-04547

Dear Mr. Knutson:

Our office represents the City of Fargo and also RSKCo, who is the claims administrator for the City of Fargo.

Our clients have asked us to inform you that after completing their investigation, they find that they will not be able to assist you with any settlement or any damages or costs that you may have sustained in this incident.

Our clients regret that they must decline any claim resulting from this incident, but finds that there is no negligence on their part pertaining to this incident. This loss appears to be an act of God type loss due to the shifting of the ground, which

eventually will crack/or break water mains. The City of Fargo has no control of when and where this is happening and cannot be held liable for these types of losses.

Yours truly,
CRAWFORD & COMPANY

/s Rusty Summers
Rusty Summers, Adjuster
Fargo, North Dakota

RS/jl

319 1/2 5th Street North ■ Fargo, ND 58102 ■
(701)237-4938 ■ Fax (701)234-0551 ■
www.crawfordandcompany.com

EXHIBIT A